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REPORTS OF CASES

ARGUED AND DETERMINED

IN

G. Brit. **The Court of Exchequer,**

AND

UPON WRITS OF ERROR FROM THAT COURT

TO THE

Exchequer Chamber,

WITH

A TABLE OF THE NAMES OF CASES

AND

A DIGEST OF THE PRINCIPAL MATTERS.

—oo—

BY

HENRY HORN, Esq.

OF THE MIDDLE TEMPLE,

AND

EDWIN TYRRELL HURLSTONE, Esq.,

OF THE INNER TEMPLE,

BARRISTERS AT LAW.

—oo—

VOL. I.

FROM HILARY TERM, FIRST VICT., 1838.

TO HILARY TERM, SECOND VICT., 1839.

BOTH INCLUSIVE.

=====

LONDON:

HENRY BUTTERWORTH, 71 FLEET STREET; RICHARD PHENEY,
89, CHANCERY LANE; AND G. F. COOPER, LINCOLN'S INN
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JUL 10 1901



J U D G E S
OF THE
C O U R T O F E X C H E Q U E R,
During the Period of these Reports.



1880.

The Right Hon. JAMES BARON ABINGER, L.C.B.
Sir JAMES PARKE Knt.
Sir WILLIAM BOLLAND, Knt.
Sir EDWARD HALL ALDERSON, Knt.
Sir JOHN GURNEY, Knt.
Sir WILLIAM HENRY MAULE, Knt.



ATTORNEY GENERAL.
Sir JOHN CAMPBELL, Knt.

SOLICITOR GENERAL.
Sir ROBERT MOUNSEY ROLFE, Knt.

MEMORANDA.

On Saturday the eighth of December, died the Honourable *Sir James Allan Park*, Knt., one of the Judges of the Court of Common Pleas. He was succeeded by the Right Honourable *Thomas Erskine*, Chief Judge of the Court of Bankruptcy, who was called to the degree of the coif, and gave rings with the motto "*Judicium parium.*" He took his seat on the first day of Hilary Term.

In Hilary Term, 1839, Mr. Baron *Bolland* resigned his seat in the Court of Exchequer, on account of continued indisposition, and in the vacation following, *William Henry Maule*, Esq., one of her Majesty's counsel, was appointed to succeed him, and having first been called to the degree of the coif, gave rings with the motto "*Suum cuique.*" He took his seat in the same Court on the first day of Easter Term.

In Hilary vacation, *William Goodenough Hayter*, Esq., of Lincoln's Inn, received a patent of precedence; and *John Stuart*, Esq., of Lincoln's Inn, *Samuel Girdlestone*, Esq., of the Middle Temple, and *Robert Vaughan Richards* Esq., and *Griffith Richards*, Esq., of the Inner Temple, were appointed her Majesty's Counsel.

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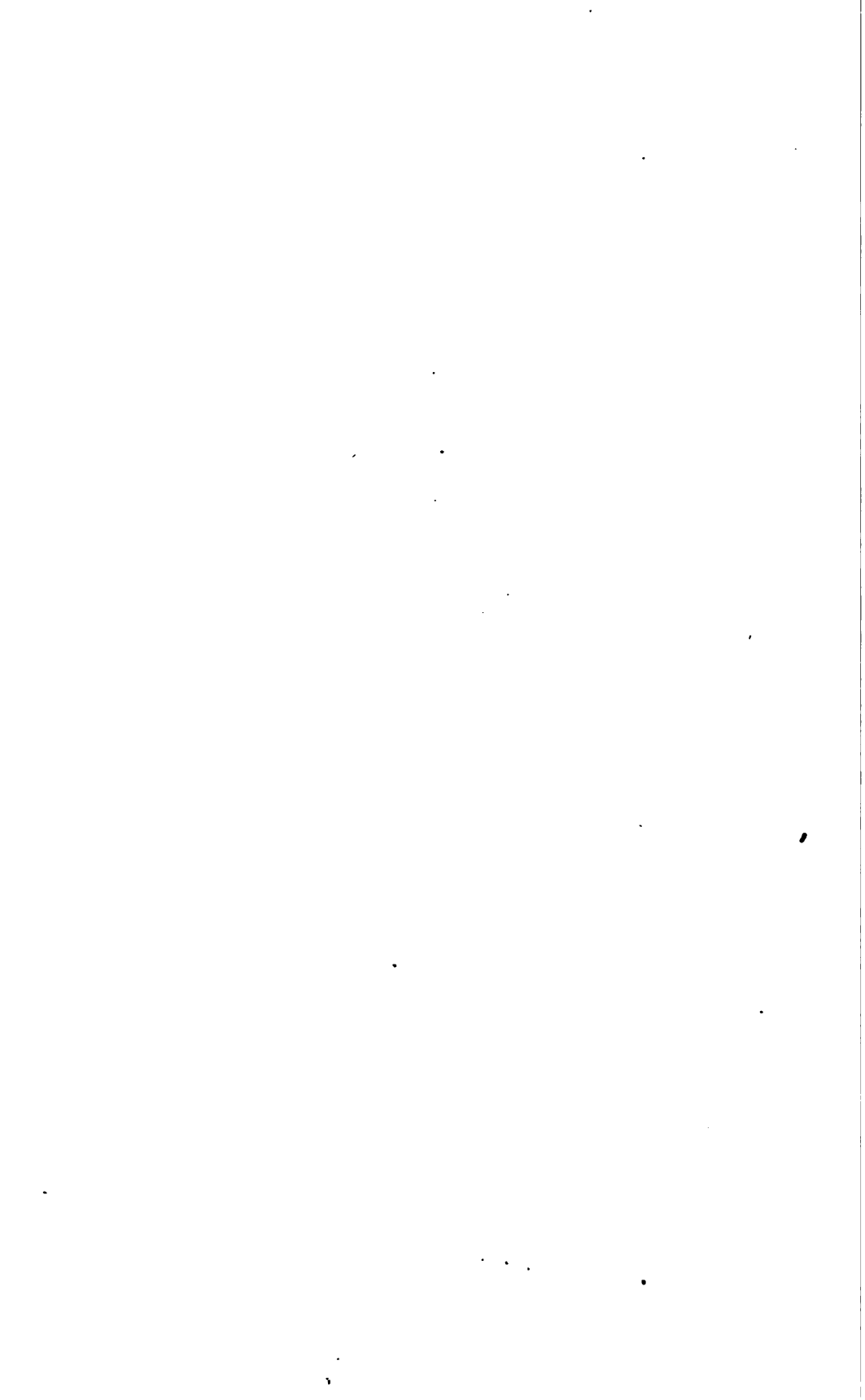
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CASES

ARGUED AND DETERMINED

IN THE

COURT OF EXCHEQUER,

IN

Hilary Term, 1 Victoria, 1838.

BURCH v. POYNTER.

Exchequer.

WORDSWORTH had obtained a rule *nisi* for the Master to review his taxation, on the ground that no bill of costs had been delivered previously to taxation, as required by the rule of this Court of *M. T. 1 W. 4, R. 10*. The defendant had not appeared to the action, which was on a bill of exchange; and it had been referred to the Master to compute principal and interest.

The rule of this Court, which requires the delivery of a bill of costs, previously to taxation, does not apply to cases in which the defendant has not appeared.

Humphrey shewed cause.—The Master states, that the practice of the Court does not require any notice of taxation, when the defendant has not appeared. The rule of *H. T. 4 W. 4, sec. 17*, which dispenses with notice of taxation, where the defendant has not appeared, must be considered by necessary implication, as superseding the rule of *M. T. 1 W. 4, R. 10. Pope v. Mann (a)*, is precisely in point.

Wordsworth, contra.—The rule of *H. T. 4 W. 4, sec. 17*, was never intended to affect the rule of *M. T. 1 W. 4, R. 10*, which is a rule peculiar to this Court.—[*Parke, B.*—That rule can only apply to cases in which the defendant has appeared, otherwise how is a bill of costs to be delivered.]—Here the plaintiff by serving a notice of taxation, has treated the case as if the defendant had appeared.

PARKE, B.—The rule of *M. T. 1 W. 4, R. 10*, has by necessary implication taken away the necessity of delivering a bill of costs, if, indeed, such necessity ever existed, in cases in which the defendant has not appeared.

Rule discharged with costs.

Eschequer.

DOE, dem. BLOXHAM v. ROE.

The omission of the *quo minus*, in a declaration in ejectment, is immaterial.

KELLY moved to set aside a declaration in ejectment for irregularity. The declaration commenced by stating, that *Richard Roe* was attached to answer *John Doe*, &c., and there was no allegation of his being "indebted to our Lady the Queen," or of the "*quo minus*," at the conclusion.—[*Parke*, B.—It has been held, that an impossible title may be rejected, provided the notice be sufficient (a).]

LORD ABINGER, C. B.—In point of fact, *Richard Roe* is neither summoned nor attached; neither is it true, that he is a debtor to the Queen. It appears to me, that the omission is of no importance.

PARKE, B.—Mr. Baron *Bayley* stated in this Court, that the strict form of declaration might be dispensed with, provided sufficient information was contained in the notice.

Rule refused.

(a) *Doe*, d. *Gore v. Roe*, 3 Dowl. P. C. 5.

WOODMAN v. GOBLE.

Where time is obtained upon terms of pleading issuably, and rejoining gratis, it only applies to the plea, and not to the subsequent proceedings.

THIS was an action to recover the amount of an attorney's bill. The defendant after obtaining time to plead upon the usual terms of *pleading issuably* and rejoining gratis, pleaded that no signed bill was delivered. The plaintiff replied, that a signed bill was delivered, concluding with a special traverse, to the country. The *similiter* having been added by the plaintiff, defendant struck it out, and demurred specially to the replication for duplicity. The plaintiff signed judgment on the ground, that the terms of pleading issuably were not confined to the plea only, but extended to the subsequent proceedings.

Whateley having obtained a rule to set aside the judgment for irregularity,

J. L. Adolphus shewed cause.—The plaintiff was justified in signing judgment, as the demurrer is frivolous.—[*Parke*, B.—If that be so you should have applied to set it aside.]—It is true, that in *Dewey v. Sopp* (a), it was held, that the terms of pleading issuably, and rejoining gratis, did not oblige the defendant, at all events, to join issue to the country, but only where the replication offered a fair issue; but the defendant is precluded from raising any objections which he could not have taken advantage of on general demurrer, *Bell v. Da Costa* (b). In *Sawtell v. Gillard* (c), the defendant being under terms of pleading issuably, demurred specially to the plaintiff's replication for duplicity; and *Abbott*, C. J., says, "the only general rule which the Court can lay down is, that where a party has obtained time, on terms of pleading

(a) 2 Str. 1185.

(b) 2 B. & P. 446.

(c) 5 D. & R. 620.

issuably, and by his pleading, fails to bring the merits of the case, or some question of fact, or some question of law arising upon the facts in issue, and does not comply with the conditions of the order. Here the defendant was bound to plead issuably, instead of which he demurs to the replication specially, upon a collateral circumstance." It was decided in *White v. Givens* (d), that where a defendant is under terms of pleading issuably, he must plead such a plea as he intends *bonâ fide* to abide by, and that after having pleaded a special plea, he could not strike out the plea, and plead the general issue, although he had not been ruled to abide by his plea. *Langford v. Waghorne* (e) shews, that at all events, it must be a fair and *bonâ fide* demurrer. In *Gisborne v. Wyatt* (f), the plaintiff replied double, and the Court held, that defendant could not demur specially, as he was under terms to plead issuably.—[Parke, B.—That case is hardly an authority, one way or the other.]—The only authorities on the other side are *Belts v. Applegarth* (g), and *Barker v. Gleadow* (h), but the latter is the opinion of a single judge, in opposition to the cases enumerated.

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Whateley, in support of the rule.—The venue is laid in *Northumberland*, and it would be almost impossible for a defendant in the ordinary course of proceeding, to plead within the eight days allowed him. The Court then grant an indulgence, upon the terms of his pleading an issuable plea, that means, that the plea when put in, should tender an issue. *Dewey v. Sopp* only decided, that a party must not demur for delay, but for good cause. *Sawtell v. Gillard* cannot be considered law at the present day. In *Belts v. Applegarth*, *Best*, C. J., says, "the order for time under terms of pleading issuably, must apply to the existing state of the cause at the time it is issued, and does not extend to cover subsequent errors. If it did, the parties might go on blundering to the end of the cause." *Barker v. Gleadow*, which was very elaborately considered, is precisely in point.

Per Curiam.—We will take an opportunity of consulting the judges of the other Courts, it is very important to have some uniform rule.

PARKE, B., on a subsequent day said, we have consulted the judges of the two other Courts, and they all agree, that the true construction of the common order for time to plead upon terms of pleading issuably, applies to the plea only, and not to the other subsequent proceedings. We, therefore, admit the authority of *Belts v. Applegarth*, and *Barker v. Gleadow*.

Rule absolute.

(d) 6 M. & S. 415.

(e) 7 Price, 670.

(f) 3 Dowl. P. C. 505.

(g) 4 Bing. 267.

(h) 5 Dowl. P. C. 134

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JACKSON v. CAWLEY.

Where to counts for money lent, money had and received, and money due on an account stated, there was one demurrer, on the ground, that they did not specify any time, the Court set aside the demurrer as frivolous.

MANSELL moved to set aside a demurrer as frivolous. The declaration contained counts for money lent, money had and received, and for money due on an account stated: to these counts there was one demurrer, assigning for cause, that no time was alleged. It was evident from the case of *Lane v. Kelwell (a)*, that it was not necessary to specify time, except in the count on an account stated.

Pike shewed cause, and contended, that the demurrer was good as to part, and could not, therefore, be set aside as frivolous.

LORD ABINGER, C. B.—It is quite clear the demurrer is good for nothing.

PARKE, B.—The demurrer is too large, the rule must be absolute.

Rule absolute.

(a) 4 Dowl. P. C. 705.

EVANS v. BARNARD.

When issue was joined in a country cause on the day before Easter Term, and no notice of trial had been given:—*Held*, that the defendant might move for judgment, as in case of a nonsuit, after one Assize had elapsed. But where in such case issue is joined in Trinity Term, the motion cannot be made until the following Easter Term.

ADDISON moved for judgment as in case of a nonsuit. Issue was joined on the 14th April last; it was a country cause, and no notice of trial had been given. From a recent decision in this Court (a), it became necessary to consider whether the application was too early. The 14th G. 2, c. 17, enacted, that where issue was joined, and the plaintiff neglected to bring such issue on to be tried, *according to the course and practice of the said Courts respectively*, it should be lawful for the judges of the said Courts, at any time after such neglect, to give the like judgment for the defendant, as in a case of a nonsuit.—[Parke, B.—The new rule which dispenses with an entry of the issue, previously to moving for judgment, as in case of a nonsuit, makes no difference as to the time of moving].—The question will depend upon when it was necessary, under the old practice, to enter the issue. In *Tidd's Practice (b)*, it is stated, "that in the *King's Bench*, if the action be laid in *London or Middlesex*, the defendant ought not to give a rule for the plaintiff to enter his issue the same term it is joined, unless notice of trial has been given. In the *Common Pleas*, when the action is laid in *London or Middlesex*, the defendant can in no case give a rule to enter the issue the same term it is joined; but must stay until the next term; and in a *country cause*, the plaintiff is in no way bound in either Court to enter his issue the same term. In the *Exchequer*, it is said, a defendant may give a rule for the plaintiff to enter his issue the same term in which it is joined; whether notice of trial has been given or not." In the present case, the practice of the Court required the plaintiff to

(a) *Smith v. Miller*, 6 Dowl. P. C. (b) 727.

enter the issue before the end of *Trinity* Term, and to proceed to trial at the Assizes after. In *Robinson v. Taylor* (c), which was a country cause, issue was joined in *Easter* vacation, and no notice of trial had been given; and *Littledale, J.*, after consideration, held that the plaintiff should have proceeded to trial at the *Summer* Assizes. The same rule is laid down in *Williams v. Edwards* (d), and *Smith v. Rigby* (e). The only case that militates against these decisions is, that of *Smith v. Miller* (f), in which the Court held, that in a country cause, where there had been no notice of trial, two Assizes must elapse, before the defendant can move for judgment, as in case of nonsuit.

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PARKE, B.—That case was decided upon the information of one of the officers of the Court, who appears to have been under a mistake; you have satisfied me, that there ought to be a rule *nisi*.

Busby on a subsequent day shewed cause, and referred to *Smith v. Miller*, and *Crowley v. Dean* (g).

LORD ABINGER, C. B.—If issue be joined in an issuable term, the rule as to two Assizes will apply, but not otherwise.

PARKE, B.—If issue be joined in the term next before the Assizes, then two Assizes must elapse, before the motion can be made; so that if issue be joined in *Trinity* Term, the defendant cannot move until the following *Easter* Term.

Rule discharged upon a peremptory undertaking.

(c) 5 Dowl. P. C. 518.
(d) 3 Dowl. P. C. 183.
(e) 3 Dowl. 705.

(f) 3 M. & W. 60.
(g) 1 C. & J. 18.

PARKER, Executrix of PARKER v. RILEY.

ASSUMPSIT. The first count stated the defendant to be indebted to *C. E. Parker*, deceased, for work and labour, as the attorney and solicitor of and for the said defendant; and also for divers journeys, and other attendances by the said *C. E. P.* as aforesaid, before then made, performed, and given, in and about the business of the said defendant. There were also counts for money paid, money lent and advanced, and money due on an account stated. The defendant pleaded thirdly, as to the first and second counts of the declaration, that the said work, labour, care, diligence and attendance, in the said first count mentioned, were respectively done, performed, and bestowed by one *Richard Stormley*, and by clerks and servants employed by the said *R. S.*, by his direction, and under his superintendence, management, and control and not otherwise, in and about the commencing, prosecuting, and defending the said causes and suits in the declaration mentioned, the same being certain causes and suits prosecuted and defended for and on behalf of the defendant, by the said *R. S.*, in the name, but without the control

Where the replication *de injuriâ*, is inapplicable, the objection can only be taken on special demurrer.

To an action for work done by the plaintiff's testator as an attorney, defendant pleaded that the work was done by one *R. S.*, that *R. S.* was unqualified to act as an attorney, and that the plaintiff's testator knowing *R. S.* to be unqualified,

permitted him to use his name for the profit of *R. S.*:—Held, that the replication *de injuriâ*, was bad.

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or interference of the said *C. E. Parker*, in his then Majesty's Courts of *King's Bench*, and *Common Pleas*, at *Westminster*; and that the said pleadings, briefs and writings in the declaration also mentioned, were drawn, copied and engrossed in the cause and for the purpose of prosecuting and defending the said causes and suits; and that the said journeys and attendances in the declaration mentioned, were performed and given by the said *R. S.*, and clerks and servants employed by him, and by his direction, in the course and for the purpose of prosecuting and defending the said causes and suits, and in relation thereto; and that the said money, in the said second count mentioned, was money paid and disbursed by the said *R. S.* in and about the prosecution and defence of the said causes and suits. And the defendant further saith, that the said *R. S.* never was admitted to act as an attorney or solicitor in the said Courts, or either of them, or in any Court of Law or Equity, in such manner as is directed by the Statute, in such case made and provided, or was a person duly qualified to act as an attorney or solicitor; and he, the said *R. S.*, before and for the whole period at and during which the said work, and labour, care, diligence and attendance, were done, performed, and bestowed, and the said journeys and attendances were performed and given, as in the declaration alleged, was a person unqualified to act or practise as an attorney or solicitor; and the said defendant further saith, that the said *C. E. Parker*, before and during the period last aforesaid, was a sworn attorney of his then Majesty's Courts of *King's Bench*, and *Common Pleas*, at *Westminster*, and that the said *C. E. Parker* being such sworn attorney, and then well knowing that the said *R. S.* was not duly qualified to act as an attorney or solicitor, and that the said *R. S.* was such unqualified person as aforesaid, did then permit and suffer the said *R. S.* to make use of the name of him the said *C. E. Parker*, upon the account and for the profit of the said *R. S.*, so being such unqualified person as aforesaid; and the said *R. S.* did accordingly, in pursuance of such permission and sufferance, make use of the name of the said *C. E. Parker*, with his privity and knowledge, and for the profit of the said *R. S.*, in and about the commencing, prosecuting, and defending the said causes and suits respectively, in and about the drawing, copying, and engrossing the said pleadings, briefs, and writings, contrary to the Statute, &c.

To this plea the plaintiff replied *de injuriâ*, to which there was a *general demurrer*.

Swan, in support of the demurrer. The replication *de injuriâ* is only admissible where the plea amounts to matter of excuse for the non-performance of the promise, *Isaac v. Farrar* (a), *Crisp v. Griffiths* (b). But where the plea denies the promise alleged in the declaration, or the facts from which the law implies a promise, the replication *de injuriâ* is inapplicable; *Solly v. Neish* (c), *Whittaker v. Mason* (d). Here the plea shews the work never was done by the testator, but by another person to whom he illegally lent his name.

The Court then called upon

(a) 4 Dowl. P. C. 750; 1 M. & W.
 65.

(b) 3 Dowl. P. C. 753; 2 C. M. &
 R. 159.

(c) 4 Dowl. P. C. 248; 2 C. M. &
 B. 355.

(d) 2 Bing. N. C. 359.

Platt in support of the replication.—The plea amounts to matter of excuse; it admits the contract, but shews the work was done under such circumstances as to excuse the party from paying for it. Besides, the objection to the replication, can only be taken advantage of on special demurrer; *Isaac v. Farrar*, and *Solly v. Neish*, were both cases of special demurrer. In *Curtis v. Marquis of Headfort* (e), *Coleridge, J.*, decided that this objection could only be taken advantage of on special demurrer.

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Swan, contra.—In *Hooker v. Nye* (f), the defendant by his plea claimed an interest in land, and the replication *de injuriâ* was held bad on general demurrer. *Alderson, B.* there says, “the replying *de injuriâ* when that plea is inadmissible, is most clearly matter of substance, and may be taken advantage of on general demurrer.” *Curtis v. Marquis of Headfort*, does not apply, as that was an application to sign judgment on the ground of the demurrer being frivolous.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKER, B.—Two questions arise on this record; first, whether the general replication *de injuriâ*, to a plea of this kind be good; and secondly, if not, whether the objection be open on a general demurrer.

We are disposed to think that the replication is bad. It is somewhat difficult to say what the precise ground of defence stated in the plea is; but it must be either that the defendant had not the benefit of the skill and personal superintendence of the plaintiff's testator, for which he must be presumed to have contracted; or that the plaintiff was not entitled to recover on the ground of the illegality of the transaction, and on either of these suppositions, the plea does not consist of *mere matter of excuse* for the non-performance of the contract declared on; it either amounts to the general issue, or is an avoidance of the contract itself. On the first supposition, it is clear the replication is bad; on the other, we all are strongly inclined to think it is so: but the second question then arises, whether the replication is good on general demurrer.

There are conflicting authorities on this point; but we think, upon consideration, that the objection cannot prevail, unless it be assigned as a cause of *special demurrer*.

The first case in the books upon this point, is that of *Forsden v. Weeks* (g), in which it was held, that the replication was bad on general demurrer, when it improperly put in issue several facts. But the Court appear to have proceeded upon the ground, that a matter of record was thereby put in issue, (though probably this circumstance would make no difference); and besides, as is remarked in Mr. *Fraser's* note to *Crogate's* case, 8 *Coke*, 76, a.; the case occurred before the 4 *Ann.* c. 16, which enacts, “that on demurrer, the judges shall proceed to give judgment according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, omission, or defect in any pleading, &c., except those which the party demurring shall set down and express, together with his demurrer; notwithstanding that such imperfection, omission, or defect, might heretofore have been taken to be matter of substance, not aided by the 27 *Eliz.* c. 5.” So that the Sta-

(e) Not yet reported.

(f) 1 C. M. & R. 258.

(g) 3 Levinz, 65.

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tute itself shews, that the reason why it was made was, that too strict a construction had been put in practice on the Statute of *Eliz.*; and in recent cases, as Mr. *Fraser* correctly states, the objection seems uniformly to have been made the ground of special demurrer. In *Banks v. Parker* (h), and *Swaiffe v. Solley* (i), this objection was held to be holpen after verdict by the Statute of Jeofails, *as matter of form*; and for the same reason, no doubt, it was likewise so held in Sir *Thomas Raymond*, 50, though matter of record was involved in the issue. This Statute of Jeofails was the 18 *Eliz.* c. 14, which enacted, "that judgment should not be reversed for any default in form, in any declaration, &c., suit, or demand," words very nearly the same as those of the 27 *Eliz.* 3, viz., "any defect or want of form in any declaration, or other pleading or course of proceeding;" and it would seem, that if the default in question be want of form under one Statute, it must be so under the other.

In conformity with this view of the case, my brother *Coleridge* decided a short time ago in *Curtis v. Marquis of Headfort*, (which is not reported) that the objection could not prevail except on special demurrer; on the other hand, in the case of *Hooker v. Nye* (j), Lord *Lyndhurst*, and my brother *Alderson* held, that the replication of *de injuriâ*, if bad, was bad on general demurrer; and Lord *Lyndhurst* said, that in *Forsden v. Weeks*, the Court decided, that the objection must prevail on general demurrer, though the Statute of 27 *Eliz.* was then in force, which enacted, that the judges should give judgment without regarding matter of form; which shewed that this objection was not here matter of form. But his Lordship does not appear to have adverted to the circumstance above mentioned, that too strict a construction had been put on the Statute of *Eliz.*, which appears by the Statute of *Ann* itself, to have been the reason for the enactment of that part of it which relates to special demurrer; nor does the attention of the Court appear to have been drawn to the cases in which this objection was held to be here matter of form, under the Statute of Jeofails.

The objection in this case appears to bear a strong analogy to that of duplicity, which is clearly matter of form, *Com. Dig., Pleader*, 94. Upon the whole, we think that this objection ought to have been made the ground of special demurrer, and therefore our judgment must be for the plaintiff.

Judgment for the plaintiff.

(h) Hob. 76.

(i) 1 Brownlow, 200.

(j) 4 Tyr. 777; S. C. 1 C. M. & R. 258.

HALL v. FRANKLIN.

The business of a banker is within the meaning of the 57 Geo. 3, c. 39, s. 3, which restrains spiritual persons from trading.

THIS was an action brought by the plaintiff, who was one of the registered officers of the Northern and Central Bank of *England*, established under the 7th G. 4, "for the better regulating co-partnerships of certain bankers in *England*," against the defendant, who was the drawer and indorser of a bill of exchange for 1000*l.* The defendant pleaded, that the bill of exchange was made, and endorsed, and delivered to the plaintiff, and the promise in the declaration mentioned, was made by the defendant, after the passing of a certain Statute, intituled, "An Act to consolidate and amend the laws relating

to spiritual persons, holding of farms, and for enforcing the residence of spiritual persons on their benefices, and for the support and maintenance of stipendiary curates in *England*." That two persons named *Richard Bassett* and *Rowland Blaney* were spiritual persons, and were partners concerned in the carrying on of the said co-partnership banking company; that the said trade is carried on, as well for the gain and profit of the said two spiritual persons, as of the several other persons concerned. That the indorsement and delivery of the bill by the defendant, to the said co-partnership, were, and are a contract made by the defendant with the said co-partnership, so including and comprehending these two spiritual persons, in the way of their trade or business of a banker, as well for their gain and profit, as for the gain and profit of the several other persons members thereof, (there was the same averment with respect to the promise), contrary to the form of the Statute. In this plea, there was a special demurrer.

The case was argued in *Michaelmas* Term, by Sir *W. Follett*, in support of the demurrer; and by *Maule* in support of the plea. The arguments fully appear in the judgment.

Cur. ado. vult.

Lord ABINGER, C. B., on the last day of *Hilary* Term delivered the judgment of the Court. After stating the pleadings, his lordship proceeded, There are grounds of special demurrer suggested; but as our attention has not been called to these in argument, and as the Court is not altogether agreed upon the objections so raised, we are not prepared to give any judgment upon them, until further argument; but as we have been pressed several times for our opinion upon the point which has been argued, and which is said to be of great and immediate importance, and as we entertain no doubt on that point, we think it right not further to postpone our judgment upon that which is the principal ground of the demurrer; namely, that the trade or business of a banker is not within the intent and meaning of this Statute. The question arises upon the construction to be given to the Statute 57 G. 3, c. 39, s. 3, which enacts, "That no spiritual person shall, by himself, or for himself, or to his use, engage in, or carry on any trade or dealing for gain or profit, or deal in any goods, wares, or merchandizes, by buying and selling for hire, gain, or profit, in any market, fair, or other place, upon pain of forfeiting the value of such goods, wares, and merchandizes, by him, or by any to his use, bargained, and bought to sell again, contrary to the provisions of this Act, and that every bargain and contract so made by him, or by any to his use in any such trade or dealing, contrary to this Act, shall be utterly void, and of none effect." The defendant contends, that the contract is made void by the Act of Parliament, inasmuch, as spiritual persons are forbidden to trade; and the Act has made void all bargains and contracts made by them in any such trade or dealing, that whether the co-partnership consists of many or few members makes no difference. That these two spiritual persons are equally interested with the others; and, that if this action can be maintained, so it might, even if these two spiritual persons were the only partners in the concern; and this was hardly contested by the counsel for the plaintiff; but he contended, that banking is not a trade or business in contemplation of the Act of Parliament; that the Statute of 57 G. 3, was intended to consolidate the laws respecting spiritual persons, not to enlarge them; and that this third section was

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intended to re-enact the 5th and 6th sections of the Statute 21 *Hen.* 8, c. 13, "That no spiritual person or persons, secular or regular, of what estate or degree soever they be, shall from henceforth by himself, nor by any other for him, nor to his use, bargain and buy to sell again for any lucre, gain, or profit, in any markets, fairs, or other places, any manner of cattle, corn, lead, tin, hides, leather, tallow, fish, wool, wood, or any manner of victual or merchandize, of what kind soever they be, upon pain to forfeit treble the value of every thing by them, or by any to their use, bargained and bought to sell again, contrary to this present Act; and that every such bargain and contract hereafter to be made by them, or by any to their use, contrary to this Act, shall be utterly void." The first observation to be made upon this argument is, that the Statute professes to do more than consolidate the former laws, it is an Act to consolidate and to amend. The second is, that the preamble recites, that doubts have arisen upon the construction of some of the said Statutes, and it is therefore necessary, that such provisions of the said acts should be explained, *and other provisions made*, and that the several laws relating to spiritual persons holding of farms, and to buying and selling, and for enforcing the residence and the maintenance of stipendary curates, should be consolidated. Then the 3d section enacts, that no spiritual person shall by himself, or by any other for himself, or to his use, engage in, or carry on, any trade or dealing for gain or profit. These words are as general as can be employed, any trade or dealing for gain or profit. It then proceeds to copy the words in the Statute of *Hen.* 8. It appears to us upon consideration, not to be a reasonable construction of this Act, to reject these general and comprehensive words, which are placed in the foreground of the enactment. They are not to be found in 21 *Hen.* 8, they are now introduced, and for the first time they constitute a clear and distinct enactment; they appear to have been introduced to further the intentions of the Act; and we do not feel ourselves at liberty to reject a plain unequivocal enactment, and to suppose, that it was introduced there, without meaning or intention. If the legislature had intended, that nothing should be forbidden that was not forbidden by the Statute of *Hen.* 8, the obvious course was to employ the words of that Statute and no other, and not to prefix to them the enactment in question. The Statute of *Henry* 8, was framed with especial view to the sort of trade then generally carried on; and the legislature may be well understood to contemplate the variety of modes in which trade is now carried on, and to direct its prohibition against trade and business carried on by spiritual persons, whatever shape it may assume. Can it be supposed, that in its anxiety to rescue spiritual persons from the suspicion of those worldly cares and habits, which trade and dealing for gain and profit are supposed to generate; it would have exposed them to the possibility of becoming bankers or exchange brokers. It has been argued on the part of the plaintiff, that the intention of the legislature, was to forbid that sort of trade or dealing only, which consists of buying and selling; because the penalty must be taken to be co-extensive with the offence, and there is no penalty except the forfeiture of the goods bought; but there is nothing inconsistent or unusual in an Act attaching a penalty of the forfeiture of goods, where there are no goods to be forfeited, simply avoiding the contract. All usurious contracts are avoided by Statute; but there is no penalty except upon the taking of unlawful interest; but a comparison of the Statute 57 *G.* 3, with that of *Hen.* 8, affords

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a strong inference against the argument. The words in which contracts are made void, appear to refer more especially to that early part of the section, which forbids spiritual persons to trade. The words taken from the Statute *Hen. 8*, may be considered as a parenthesis, excluding which, the clause will run thus, "That no spiritual person shall by himself, or by any other for himself, or for his use, engage in, or carry on any trade or dealing for gain or profit; and that every bargain and contract so made by him, or by any for his use in any such trade or dealing, contrary to this act, shall be utterly void, and of none effect." The words in the latter part of the section, *such trade or dealing*, appear to refer to the words *trade or dealing* in the early part of the section. In that part of the section which is copied from the Statute of *Hen. 8*, although the word *deal* is to be found, the word *trade* is not. The part of the clause which is copied from the Statute of *Hen. 8*, except for the purpose of forfeiting the things bought and sold, and bought with intent to sell, might have been omitted altogether. We have been strongly pressed with the inconveniences that may result from this construction of the Statute. We are not insensible to them, but the only proper effect of that argument is to make the Court cautious in forming its judgment. We cannot on that account, put a forced construction on the Act of Parliament.

BARTON v. RANSON.

KELLY shewed cause against a rule obtained by *Erle*, for an attachment against the plaintiff, for non-payment of money, in pursuance of an award. By the order of reference, the arbitrator was to make his award by a certain day, with liberty to enlarge the time. An award was made, reciting that the time had been duly enlarged; but there was no affidavit of that fact. It was submitted, that a party seeking to bring another into contempt, should shew that every thing had been done which was requisite.—[*Parke, B.*—This point was decided in *Davis v. Vass (a)*.]

Erle, contrâ.—Referred to the rule making the order of reference and enlargement of time, a rule of Court.—[*Parke, B.*—Is it the practice to make an enlargement of time a rule of Court, without an affidavit that it was duly enlarged? if such affidavit be a necessary part of the practice, the rule of Court will be good evidence of that fact. The case of *Dickens v. Jarvis (b)*, is precisely in point.]

Lord ABINGER, C. B.—The proper course would be to enlarge the rule, so as to afford the plaintiff an opportunity of moving to discharge the rule making the order of reference a rule of Court, and for the defendant to shew by affidavit, that the time was duly enlarged.

PARKE, B.—If there has been no affidavit of the due enlargement of the time, the plaintiff should move to set aside the rule making the order of reference and enlargement of time a rule of Court. We must assume, *primâ*

Where an order of reference and enlargement of time have been made a rule of Court, it cannot be shewn as cause against an attachment for non-performance of the award, that there was no affidavit that the time was duly enlarged, but if, in fact, there is no such affidavit, the proper course is to move to set aside the rule of Court.

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facie, that the Court is correct in making that order and enlargement of time a rule of Court.

Rule accordingly.

SIMPSON v. NICHOLLS.

To *indebitatus assumpsit* for goods sold and delivered, and on an account stated, the defendant pleaded as to 18s. 6d. parcel, that they were sold on a *Sunday*, in the way of the plaintiff's trade and business: Replication, that although the goods were sold at the time, and in the manner stated, still, that the defendant kept and detained the same, without offering to return them, whereby he became liable to pay for them on a *quantum valebant*. On demurrer to the replication, it was held bad, on the ground that it ought to have shown a new promise to pay after the retaining of the goods by the defendant.

I*NDEBITATUS assumpsit*, for goods sold and delivered, and on an account stated. *Plea* as to 18s. 6d., parcel, &c., that the plaintiff ought not further to maintain his action, because the said sum was for the price of wine and bottles sold and delivered on a *Sunday*, in the way of the plaintiff's trade and business of a wine merchant; and that the promise to pay for the same was made on that day. Replication—that although the goods were sold at the time, and in the manner stated in the declaration, yet that the defendant hath kept and detained the same without offering to return them, whereby he became liable to pay for them on a *quantum valebant*. There was another plea as to a certain other parcel similar to the foregoing, to which a like replication was pleaded. Special demurrer assigning for causes that the replication neither traversed, nor confessed and avoided, nor shewed a fresh promise, and that the replication was a departure.

Martin, in support of the demurrer. The replication is bad; the proper course would have been for the plaintiff to have new assigned a new promise, instead of stating such new promise in his replication. The case of *Williams v. Paul* (a), will, doubtless, be relied upon at the other side; it is, however, distinguishable from the present. In that case, the defendant had purchased three cows and a heifer on a *Sunday*, to be paid for in three months. He afterwards objected to pay for the heifer, alleging that it was not the one he had chosen. The beast, however, remained with him, and some time afterwards, upon being applied to for the price, the defendant said he would pay when the time agreed on was up. The case of *Read v. Rann* (b), explains the proper mode of proceeding in a case like the present, and the legal inferences from which a new promise will be implied. In that case, *Park*, J. says, "The custom supposes a special contract between the parties, and if that is not satisfied, no claim at all arises, for no other contract can be implied. In some cases a special contract not executed, may give rise to a claim in the nature of a *quantum meruit*, *ex. gr.* when a contract has been made for goods, and goods sent, not according to the contract, are retained by the party, then the claim for the value on a *quantum valebant* may be supported, but then from the circumstances a new contract may be implied." This shews clearly, that the proper course for the plaintiff would have been a new assignment, and that the present replication is a departure.

Curzon, contrd.—This is no departure; there is nothing in the replication inconsistent with the declaration.—[*Parke*, B.—The real question is, whether your replication is good in substance.]—Adverting to this view of the case, the plaintiff no doubt relies on *Williams v. Paul*.

LORD ABINGER, C. B.—There is another difficulty in the plaintiff's case, viz., that the goods might have been consumed; he ought to shew the defendant has it in his power to return the goods.

PARKE, B.—The replication ought to have stated the legal result of the facts, and not the facts themselves; in other words, the replication ought to have averred that he retained the goods, and afterwards promised to pay; no promise is shewn subsequent to the statement of the amount. Even supposing the decision in the *Common Pleas* correct, and that where a party keeps goods sold under an illegal contract, a new promise may make him liable. In *Williams v. Hall*, the Court proceeded upon evidence of an express promise after the retainer, and for want of it here the replication is bad.

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BOLLAND, & GURNEY, B.'s, concurring.

Judgment for defendant.

SUNBOLP v. ALFORD.

TRESPASS. Declaration stated, that the defendant assaulted the plaintiff, and took away his coat, and kept and detained the same, and converted it to his own use.

There were three pleas, the third of which was demurred to, and was in substance as follows, viz: That the defendant was an innkeeper, and that the plaintiff and some others, to the defendant unknown, entered his house and took refreshment therein, and that after having partaken thereof, the defendant requested the plaintiff to pay, and on his refusal, the defendant *moliter manus imposuit*, and took his coat as a pledge for the price of the refreshment.

An innkeeper cannot, in default of payment of his bill, detain either the person of his guest, or the clothes he is wearing.

Wordsworth, in support of the demurrer, was stopped by the Court, who called upon *Humfrey* to support the plea, who argued that the plea was good on the authority of the case of *Newton v. Tring* (a), where *Eyre, J.*, says, "Innkeepers are compellable by the constable to lodge strangers, they may detain the persons of their guests who eat, or the horse which eats until payment." So also in *Bacon's Abridgment*, Tit. Inn, it is stated, "that innkeepers may detain the person of the guest; for men that get their livelihood by entertainment of others, cannot annex such disobliging conditions, that they shall retain the parties' property in case of non-payment, nor make so disadvantageous and impudent a supposition, that they shall not be paid, and therefore, the law annexes such a condition, without the express agreement of the parties." The case in *Shower*, is an express authority, that the landlord of an inn, may detain the person of his guest in default of payment, and it were unreasonable if the law did not give him such a power. If it were otherwise, it would be impossible for an innkeeper to enforce his claim. In the case of *Ward v. Clerke*, *Michaelmas Term*, 30 *Geo. 3*, as stated in the 9th vol. of *Wentworth's Pleading*, page 362, a plea similar to the present, was held good on demurrer. All other persons may at their option, refuse to make a contract; an innkeeper is bound to receive and supply all such as offer, and for whom he has accommodation. There is a well known case, as to the right of

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a landlord to retain a horse for his meat; now the landlord is equally bound to receive a man as a horse, and the principle which authorizes the detention of the one, is equally applicable to the other. In neither case, can he charge for the supply until it is consumed; and as in the one case, he can retain the horse, so in the other, he may detain the person. If the ground relied upon, as impugning the right to detain the coat, be the apprehension of its leading to a breach of the peace, the same reason will equally apply to the detainer of the person.—[*Parke, B.*—Would he have a right to take all his clothes? This query will test the principle, the intention in the case before the Court, is not to detain the plaintiff, but to take the coat as a payment.]—Suppose the plaintiff had a bundle of goods, would not the defendant be entitled to take them.—[*Parke, B.*—If laid down out of the plaintiff's controul, the innkeeper would have a right to sieze it for his lien.]—If he put it down beside him, and not out of his controul, would the innkeeper have a right to take it? It is submitted that he would; the fact of having his hand upon it, would not make any difference. The sum of the argument is; the case before the Court, presents no greater difficulties than the right to detain the person; if the Court, however, think the decision as to the latter point erroneous, of course the plea is not maintainable.

Wordsworth, contrd.—The declaration of *Eyre, J.*, in *Shower*, is not followed up by the approbation of the other judges, and moreover, it was not necessary to the decision of the case then before the Court, and amounts only to an *obiter dictum*. The defendant in his plea admits, that this is a debt, and it is expressly laid down in the *Six Carpenter's* case (*b*), that a person going into an inn, and not paying for his wine, is not a trespasser *ab initio*. In *Jones v. Thurloe* (*c*), it was determined, that an innkeeper had a right to detain a horse for the expenses of his keep, but if he suffered the guest to take away the horse without payment, then he waives the benefit of the custom. That case shews, that a *lien* is the innkeeper's remedy. Here the Court contemplated no power to detain the person. In *Thompson v. Lacy* (*d*), Mr. Justice *Bailey*, never pretends to say, that there is a remedy against the person. His Lordship, says, "I think the defendant is under the obligations to which innkeepers are liable, viz.: that is, bound to receive all persons who are capable of paying a reasonable compensation for the accommodation provided, and that he is liable for their goods, if lost or stolen; and on the other hand, that he has a lien on the goods of his guests, for the payment of his bill." The 11th & 12th *Wm. 3*, c. 15, s. 2, enacts, that if any innkeeper, &c., shall sell any beer in a vessel not stamped, or, if in giving an account of the reckoning, such innkeeper shall refuse or deny to give the particular number of quarts or pints of ale, or beer, for which demand is made in such account, it shall not be lawful for such innkeeper for default of payment of such reckoning, to detain any goods or other thing belonging to the person from whom such reckoning shall be due. It would be inconsistent in the legislature, to take away by express words, the remedy against the goods, if they still allowed the remedy against the person to remain: the inference therefore is, that they did not recognize any such right. Another conse-

(*b*) 8 Co. 290.
 (*c*) 8 Mod. 172.

(*d*) 3 B. & A. 287.

quence of such a privilege in a landlord would be, to enable him collaterally to repeal the Statute against the arrest for small debts. It does not follow, even from a right to detain the person, that he would have a right to retain the coat. Where would such a right end? would he not by necessary consequence have the power to strip the person naked. Moreover, the coat was in use. Now in *Co. Litt.* 47, a, it is expressly laid down as to a distress, that nothing in actual use can be distrained. So as to an extent, where the title of the Crown is paramount it is laid down in *Com. Dig.* tit. *Dett.* (G. 3), that things necessary *pro victu* of the king's debtor and his family, shall not be seized. Will it be said, that wearing apparel is less necessary, *pro victu*, than food. It may be argued, that there are cases in the books to shew, that the wearing apparel of persons in bed may be seized; there however, it is not (as here) in use. So also of clothes sent to a laundress. Supposing it even true to this extent, that there was a right of lien as to the coat, still the detention was unlawful; and in *Griffith v. Hyde (e)*, *Lawrence, J.*, says, a lien cannot be created by a wrongful act. In *Wolf v. Summers (f)*, it is said, that although the master of a ship has a lien on his passengers' baggage for the passage money, he has none upon his clothes. In a case in the *King's Bench*, (not reported) where there was a plea, justifying an assault and detention of the person of the plaintiff on the same grounds, as those justifying the seizure of the coat in the present plea, the Court held the plea bad on demurrer.

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LORD ABINGER, C. B.—I should be sorry to want any authority in this case. A mere *dictum*, such as that of *Eyre, J.*, which is relied upon by the defendant, I conceive, to be of no authority. As to *Wentworth's Pleading*, it is exceedingly inaccurate and ill-digested. If an innkeeper has a right to detain at all, he has such right until he is paid, and in some cases, that would amount to a detainer for life. In this manner, he might detain for that, for which he could not by law imprison. He is thus a judge in his own cause. As to a lien, it is an exception to the general rule of law in favour of certain trades; and it is always coupled with the possession of the party who has a right to detain. He has no right, however, to take clothes in wear. In the case put in the argument, of a basket or bundle in the debtor's hand, I am of opinion, the innkeeper would have no right to detain it. I think, it would be monstrous to give any person the power to imprison for life, without process of law; without process to shew whether the money was due or not. I say in principle, the plea is utterly bad. In case of a distress, the law excepts goods in use, or a horse which a man is riding; clothes on a man's back cannot be taken under a *fi. fa.*; for these, among other reasons, I am of opinion, the plea is bad.

PARKE, B.—I also agree, that the plea is bad. The innkeeper, being by law, bound to receive guests, has a lien for the purpose of working out payment. In *Thompson v. Lacy*, it was so decided.

It is admitted, that the present plea cannot be supported, without also establishing the principle, that the law gives a right of lien on the person. This is a very startling proposition, amounting in truth, in the case of a poor

(e) Sel. N. P. 8 ed. 1399.

(f) 2 Camb. 631.

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man, to a right of perpetual imprisonment; and a proposition, to which I should not be inclined to assent, without an express authority. The case in the *King's Bench*, referred to, overrules the *dictum* of *Eyre, J.*, as to the lien against the person, and it is conceded, that unless there is a power to that extent, the plea fails. Even if there were a power to such an extent, I should think the present plea not maintainable. There would be nothing to prevent a person, having authority to take a coat, to strip off all the clothes, and this in the case of a female, as well as a male. In executions, extents, and distresses generally, the law does not allow wearing apparel in use to be taken; I think it absurd, to hold, that it would confer such a privilege in the case at the bar.

BOLLAND, B.—I am of the same opinion. Without going over the ground which has been already traversed, I think it sufficient to say, that the doctrine of lien cannot apply to wearing apparel in use; as well from its tendency to lead to a breach of the peace in such a case, as also by reason of the duress and disgrace it would entail on the party upon whom it would be exercised.

GURNEY, B.—Concurred.

Judgment for the plaintiff.

GOWER v. ELKINS.

Where a summons is taken out to stay proceedings on payment of a certain sum and costs, the refusal to accept that sum, will not render the plaintiff liable to the subsequent costs. But if the sum tendered be afterwards paid into Court and accepted by the plaintiff, he will be liable to costs.

THIS was an action for work and labour, goods sold, &c. The writ issued the 1st *September*, indorsed for 239*l.* On the 21st *November* the plaintiff declared, and on the 19th *December*, defendant took out a summons to stay proceedings, on payment of 150*l.*, and costs, in addition to 28*l. 8s. 5d.*, the amount of a set off. The summons was attended before *Bolland, B.*, when the plaintiff refused to accept the 150*l.*, alleging more to be due, and the summons was indorsed accordingly; subsequently the defendant pleaded *non assumpsit*, and a set off, but did not pay the 150*l.* into Court. Application had been made to the master as to the practice, and he stated that the refusal to accept the 150*l.*, would make the plaintiff liable for all the costs subsequent to the offer.

Rowe moved for a rule to shew cause why the defendant should not pay into Court the 150*l.*, and amend his pleas; or why, in default thereof, the plaintiff should not be free from his liability to pay costs.

PARKE, B.—If a defendant is once ready to pay a given sum, and the plaintiff refuses to receive it, alleging more to be due, and afterwards the defendant pays that sum into Court, and the plaintiff takes it out, that is *prima facie* evidence of oppressive conduct, and of an endeavour to make costs, and unless some explanation be given, the Court will order the defendant to be excused from the intermediate costs, and make the plaintiff pay the defendant's costs incurred since the offer. The opinion of the master has arisen from a misapprehension of an order made in some cases, viz., that unless the plaintiff recovers a certain sum which he has already refused, he must pay costs. In the present case there is no occasion to grant a rule.

Rule refused.

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CASE. The declaration stated the recovery of a judgment against one *Gompertz*, that thereupon a *testatum fieri facias* issued and was delivered to the defendant, who was then sheriff of *Surrey* to execute; it then alleged, that although there were then and afterwards, and before the return of the said writ, divers goods and chattels of the said *Gompertz* within the bailiwick of the defendant, as such sheriff, whereof the defendant could and might, and ought to have levied the monies indorsed on the writ, whereof the defendant had notice, and although a reasonable time for the defendant to have made the levies, and before he made the return to the writ had elapsed; yet the defendant not regarding his duty as such sheriff, did not nor would within such reasonable time levy the said monies or any part thereof, but therein wholly failed and made default, and afterwards, to wit, on &c., falsely returned upon the said writ, that *Gompertz* had not any goods or chattels in his bailiwick, whereof he might cause to be levied the damages aforesaid. The defendant pleaded not guilty.

In an action against the sheriff for not levying under a *fi. fa.*, the plea not guilty, admits the judgment, the writ, the delivery of it to the sheriff that there were goods in his bailiwick, and that the defendant had notice of it. The only defence available under that plea is that he did levy within a reasonable time, and that he did not make the return alleged.

At the trial before *Littledale, J.*, at the last assizes for the county of *Surrey*, evidence was tendered on the part of the defendant, to show that *Gompertz* had not any goods within the defendant's bailiwick. This evidence was objected to by the plaintiff, on the ground that it was not admissible under the plea of not guilty. The learned judge received the evidence, and a verdict was found for the defendant.

Channell, having obtained a rule to enter a verdict for the plaintiff, or for a new trial.

Thesiger, Dowling, and Turner, shewed cause, and endeavoured to distinguish the present case from *Wright v. Lainson (a)*. Here the fact of there being goods in the defendant's bailiwick, was not here matter of inducement or a fact, separately and independently alleged in it, but it is involved in the breach of duty, and therefore in issue under the plea of not guilty. In actions for an escape, the plea of not guilty operates as a denial of the neglect or default of the sheriff or his officers, but not of the debt, judgment, or preliminary proceedings. There would be no breach of duty, unless *Gompertz* had goods in the defendant's bailiwick.

PARKE, B.—The inducement points the duty of the sheriff to the particular thing upon which the complaint arises. In *Wright v. Lainson*, the duty was alleged to be, to pay over the money levied, and the breach was, that he did not so pay it over. Here the duty pointed out by the inducement, is to levy within a reasonable time, and the breach is, that he did not so levy. There is then a further allegation, that he returned *nulla bona*, which is a wrongful act, if the fact be true, as stated in the inducement, that there were goods of *Gompertz's* within his bailiwick. But that fact must be taken to be true, inasmuch as it is not denied. The plea by not denying, admits the judgment, the writ, the delivery of it to the defendant as sheriff, that

(a) 6 Dowl. P. C. 146; S. C. 2 M. & W. 739.

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there were goods in his bailiwick, and that the defendant had notice of it. The only propositions available to the defendant under his plea; are, first, that he did levy within a reasonable time, and secondly, that he did not make the return alleged. As to the illustration of the rule given in an action for an escape, we had to consider it in the case of *Wright v. Lainson*, and there is no doubt that the operation of the plea in this instance is incompletely stated. It operates as an admission, not only of the preliminary proceedings, but of all the facts stated in the inducement. The rule must be absolute for a new trial, the defendant to be at liberty to amend his plea.

ALDERSON, B.—The plea of not guilty, puts that fact in issue which is wrongful, if the facts stated in the inducement be true. Now the inducement states as a fact, that there were goods of *Gompertz* in defendant's bailiwick, and that fact not being denied by the plea, is admitted to be true. Then it is alleged that the defendant returned *nulla bona*, that action, therefore, becomes a wrongful act, by force of what is admitted in the inducement, and it is the wrongful act put in issue by the plea of not guilty. The word, falsely, denotes a conclusion of law, if the facts stated in the inducement be true, but it is not a separate and traversable allegation. As for the breach of duty in not levying, the defendant seeks to excuse himself, and improperly obtains a verdict by proof of a fact, the contrary of which is admitted by him on the record.

Rule absolute for a new trial, the defendant
 to be at liberty to amend his plea.

GERRARD v. ARNOLD.

Where on reference of an attorney's bill to taxation, the parties agree to waive the delivery of a signed bill *primâ facie*, they waive the operation of the 2 Geo. 2, c. 23.

IN this case the usual order was made for the taxation of an attorney's bill; more than one-sixth having been taken off on taxation, the attorney was ordered to pay the costs.

Erle moved for a rule to shew cause why the order that the attorney should pay the costs should not be discharged, on the ground that no signed bill had been delivered. The Court had no power to order an attorney's bill to be taxed, independent of 2 Geo. 2, c. 23, *Doe, d. Palmer v. Roe* (a), and the mere act of taxation is no consent by the party to waive it, *Howard v. Groom* (b). An unsigned bill referred to the master, is a mere reference to him.

Petersdorff shewed cause upon an affidavit, that it was agreed that a signed bill should be dispensed with.

PARKE, B.—The question is, whether by waiving the delivery of a signed bill, you do not waive the operation of the Statute so far as it gives an authority to order the attorney to pay the costs. Your affidavit ought to shew that it was the intention that all the provisions of the Statute should be adopted, if they intended to waive the Statute *primâ facie*, they waived all its consequences.

Per Curiam. The rule must be absolute.

(a) 4 Dowl. P. C. 95.

(b) 4 Dowl. P. C. 21.

FARWIG v. COCKERTON.

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R. V. RICHARDS moved to rescind an order of *Parke, B.*, for amending the record in this case, and to set aside the verdict and subsequent proceedings. It was a writ of trial before the Secondary in *London*, and upon the cause being called on, and before the jury were sworn, the defendant objected that there was a variance between the issue and the record, inasmuch as the latter omitted the date of the writ of summons. The plaintiff insisted upon proceeding with the trial, and obtained a verdict, the defendant conducting his case under protest. On an application being subsequently made to *Parke, B.*, he ordered that the record should be amended by inserting the date of the writ of summons.—[*Parke, B.*—I made the order for the amendment on the authority of *Cox v. Painter*, in the New Term Reports (a).]—An incorrect statement of the date of the writ of summons in the writ of trial, has been held a sufficient ground for setting aside the verdict, *Wight v. Perrers* (b). So an omission to transcribe into the issue the dates of the pleadings, was held to constitute a variance, of which the defendant was entitled to avail himself after trial, and after the roll was made up, although the date appeared upon the roll, *Worthington v. Wigley* (c).

A variance between the issue and the writ of trial may be amended at any time.

PARKE, B.—The only question is, whether there is not a power to amend under the proviso in the rule. It states "that issues, judgments, and other proceedings in actions, commenced by process, under 2 *Will.* 4, c. 39, shall be in the several forms in the schedule hereunto annexed, or to the like effect, *mutatis mutandis*: provided, that in case of non-compliance, the Court or a judge may give leave to amend." Under this proviso, it appeared to me that I might order an amendment at any time.

Rule refused (d).

- (a) 1 W. W. & D. 228.
 (b) 5 Dowl. P. C. 463.
 (c) 5 Dowl. P. C. 209.

(d) See *Blisset v. Ferrant*, C. P.,
 H. T., 1838.

EDMUNDS v. KEATS.

BARSTOW opposed the justification of bail. The objection was, that the bail had sworn that they were worth property to the amount of 100*l.* "over and above all their just debts," instead of "over and above *what will pay* all their just debts," as required by 1 *Reg. Gen.*, H. T., 2 *W.* 4, s. 19 (a). He referred to *Miller's Bail* (b).

Bail must swear that they are worth the necessary amount "over and above *what will pay* all their just debts."

Thomas, in support of the bail, relied on the previous rule of H. T., 1 *W.* 4, and cited *Hunt's Bail* (c).

PARKE, B.—The terms of the latter rule must be complied with, and consequently the affidavit is insufficient.

- (a) 1 Dowl. P. C. 185.
 (b) 5 Dowl. P. C. 602.

(c) 4 Dowl. P. C. 272

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M'KINTOSH v. TROTTER.

Trover will not lie for fixtures.

TROVER for certain goods, chattels, and effects. *Plea, first, not guilty; secondly, a justification under a fiat of bankruptcy against the plaintiff.*

At the trial before *Coltman, J.*, at the last Assizes for *Liverpool*, it appeared that the plaintiff was tenant of the premises, on which the property had been seized. The sale consisted of two lots, the first comprising goods and chattels, and the second, fixtures, good will, licence, &c. The plaintiff abandoned his claim for the good will and licence, but claimed to recover 55*l.* for the fixtures. The petitioning creditor's debt not being proved, a verdict was found for the plaintiff for 79*l.* 8*s.* 8*d.*, the value of the goods, chattels, and fixtures.

A rule having been obtained by *Cowling* to reduce the verdict to 24*l.* 8*s.* 8*d.*, the value of the goods and chattels, on the ground, that the fixtures could not be recovered in this action.

Cresswell, Wightman, and Addison shewed cause.—The plaintiff having power to remove the fixtures at the time they were seized, may maintain either trespass or *trover* for them. In *Pitt v. Shew* (a), the plaintiff recovered the value of fixtures, in trespass for taking "goods, chattels, and effects." In that case *trover* might have been maintained, for the wrongful detention and conversion. Fixtures cannot be recovered under a count for goods sold, *Lee v. Risdon* (b), *Nutt v. Butler* (c). It must be admitted, that a tenant cannot maintain *trover* for fixtures left by him after the expiration of his term; but the case is different when he is in possession. In *Colegrave v. Dias Santos* (d), *Abbott, C. J.*, thought the plaintiff might recover in *trover* for fixtures.—[*Parke, B.*—That was merely the first impression at *Nisi Prius*. It afterwards became unnecessary to decide that point in *banco*.]—In *Lawton v. Salmon*, reported in a note to *Fitzherbert v. Shaw* (e), it was never objected that *trover* would not lie for fixtures. If these fixtures were removable by the plaintiff, they must be considered as personal chattels, *Davis v. Jones* (f). In a case cited in *Lawton v. Lawton* (g), *Comyns, C. B.*, thought *trover* would lie to recover the value of a cider-mill affixed to the freehold.—[*Parke, B.*—The question as to whether *trover* could be maintained, does not appear to have been raised.]—After treating this property as the goods and chattels of the bankrupt, it is not competent for the defendant to turn round and say, they are fixtures.

PARKE, B.—I am of opinion the rule must be absolute. This question was much considered by my brother *Alderson* and myself in *Minshall v. Lloyd* (h); it was there contended by Mr. *Cresswell*, that fixtures were not goods and chattels at all, and could not be recover in an action of *trover*. I see no reason to doubt that the Court came to a correct decision in that case. The Court then decided, that the principle of law is *quicquid solo plantatur*

(a) 4 R. & A. 206.
(b) 2 Marsh. 495.
(c) 5 Esp. 176.
(d) 2 B. & C. 76.

(e) 1 H. B. 258.
(f) 2 B. & A. 165.
(g) 3 Atk. 13.
(h) 2 M. & W. 450.

solo cedit. The right of the tenant is to remove while he is in possession, and so convert the fixtures into personal chattels

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BOLLAND and GURNEY, B.'s. concurred.

Rule absolute to reduce damages.

PARKER, Executrix v. SERLE.

THIS was an action to recover the amount of an attorney's bill, the defendant pleaded, first, *non assumpsit*; secondly, that the work was done by an unqualified person, in the name of the attorney; thirdly, payment; and lastly, set off. The cause came on for trial before Lord Denman, and was partially heard, when counsel consented to a verdict for the plaintiff upon the two first issues, the bill to be referred for taxation, and the Master to enter into the whole account. The Master allowed the plaintiff's claim, amounting to 122*l.*; and, also the defendant's set-off to the amount of 119*l.* 10*s.*, leaving a balance in favour of the plaintiff of 2*l.* 12*s.* Upon this the Master refused to tax the costs upon the higher scale, and a summons for that purpose was taken out before Lord Denman, who thought he had no power to interfere.

In an action on an attorney's bill, with a plea of set off, the cause being partly heard, it was referred to the Master, who was to enter into the whole account. The Master found a balance due to the plaintiff of 2*l.* 12*s.*—Held, that this was a sum "recovered" within the directions to taxing officers, and that the plaintiff was not entitled to costs upon the higher scale without a certificate.

V. Lee now made a similar motion. The learned judge has power to certify at any time, that this was a proper cause to be tried in the superior Courts. In the "directions to taxing officers, the words tried before a judge in one of the superior Courts, or judge of Assize," do not mean that the judge is to hear the whole cause, but that the cause is "brought on for trial," *Nokes v. Frazer (a)*, *Broggref v. Hawke (b)*.

PARKER, B.—There is no doubt the Chief Justice has power to certify, and without his certificate we cannot grant your application. This Court decided last term, in the case of *Wallen v. Smith (c)*, that where a case was referred to an arbitrator, who awarded a sum less than 20*l.*; that was a sum *recovered*, within the meaning of the directions to taxing officers.

(a) 3 Dowl. P. C. 339.
(b) 6 Dowl. P. C. 67.

(c) 6 Dowl. P. C. 103.

HOLDERNESS v. BARKWITH.

ERLE moved for a rule *nisi* to rescind an order of Gurney, B., "for the taxation of the costs of the plaintiff's attorney, and that in case of less than one sixth being taken off, the plaintiff should pay the costs of the taxation." The writ was indorsed for 50*l.* debt, and 3*l.* costs, upon taxation, 9*s.* 2*d.* was taken off, and the Master allowed 2*l.* 10*s.* 10*d.*

If in a short cause an attorney wilfully make a charge, however small, to which he is not entitled, the court will not allow him the costs of taxation, though less than one sixth be taken off.

taxation, though less than one sixth be taken off.

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Platt shewed cause.—It is admitted by the taxation, that the attorney is entitled to 2*l.* 10*s.* 10*d.*, and yet this rule is to give the plaintiff the costs of the taxation.—[*Parke, B.*—If one sixth is taken off, the attorney is to pay the costs, but not *vice versa*.]—Costs are of a fluctuating nature, and an attorney cannot calculate exactly to how much he is entitled.—[*Parke, B.*—In short cases of this kind, an attorney ought not to put down one shilling more than he is entitled to.]—He must indorse upon the writ the probable amount of costs, and it is difficult for him to tell what the Master will allow.—[*Parke, B.*—The only costs that are fluctuating, are the costs of service.]

The Court then examined the bill, by which it appeared the 5*s.* 6*d.* charged for a letter, had been struck out, because it was not written, and there was another item of 2*s.*, to which the attorney had no claim whatever.

GURNEY, B.—If these facts had been before me, I should not have made the order.

PARKE, B.—If one shilling too much were wilfully charged, I think the attorney ought not to have the costs.

ALDERSON, B.—But if the charge was made through mistake or inadvertence, it is another matter.

PARKE, B.—A different rule may be applied where there is a long bill from the case of a short one, where the attorney must know how much he is entitled to charge. The rule must be absolute.

Rule absolute (a).

(a) See *Barker v. Wills*, 2 C. & M. 856; *Elwood v. Pearce*, 8 Bing. 83; S. 415; *Mills v. Revett*, 1 Adol. & E. C. 1 M. & Scott, 159.

PURNELL v. YOUNG.

To trespass for breaking and entering plaintiff's stable, and taking a horse, defendant pleaded not guilty, that the stable was not the plaintiff's, and leave and licence. A verdict having been found for the plaintiff with one farthing damages, the Judge certified under the 43 Eliz. c. 6:—*Held*, that the plaintiff was entitled to full costs, notwithstanding the Judge's certificate.

TRESPASS for breaking and entering a stable, and taking away a horse and assaulting the plaintiff. Pleas, *first*; not guilty, *secondly*, that the said stable was not the stable of the plaintiff; *thirdly*, as to the breaking and entering the stable, leave and licence; *fourthly*, as to taking the horse, that it was not the plaintiff's horse; *fifthly*, as to the assault, *son assault demeine*.

The cause was tried before *Patteson, J.*, at the *Monmouth Summer Assizes*, 1836, when a verdict was found for the plaintiff, with one farthing damages, on the four first issues, and for the defendant on the last. The learned Judge certified to deprive the plaintiff of costs under the 43 Eliz. c. 6.

A rule *nisi* having been obtained, by *R. V. Richards*, for the Master to tax the plaintiff his costs, notwithstanding the Judge's certificate.

Mauls showed cause.—The question turns upon the construction of the

43 *Eliz.* c. 6, s. 2, and the 22 & 23 *Car.* 2, c. 9, s. 136 (a). So far back as the case of *Clegg v. Molynous* (b), there appears to have been a difficulty in the construction of the latter act, and Lord *Manfield*, in delivering judgment, says, "there is a puzzle and perplexity in the cases on this part of the statute, and a jumble in the reports."—[*Parke, B.*—Here the plea of leave and licence takes the case out of the Statute of *Charles*; there are numerous cases to that effect, and we feel bound by them; so long as I have been in the profession, that point has been considered as settled.]—Those cases proceeded upon the ground, that where an interest in land could not by any possibility come in question, the Statute was inapplicable, but the early decisions which put that construction upon the Statute, took place before the 4 *Ann.* c. 16, which allows several matters to be pleaded, and therefore, at that time, under the plea of leave and licence, the freehold could not come in question, as no other matters could have been pleaded. The 4 *Ann.* c. 16, by allowing several matters to be pleaded, has altogether altered the law. Suppose the case of a double plea, that defendant was not guilty, and that plaintiff was not possessed of the stable, and that such plea was not demurred to, it would be the same in effect as the two pleas of not guilty, and not possessed. Formerly, not guilty and a justification, were not allowed to be pleaded together, *Barnett v. Greaves* (c). One of the earliest decisions on the statute of *Charles* is the case of *Asser v. Finch* (d), which was trespass for entering a close, the defendant justified for a way there, and the plaintiff replied extra *viam* and issue thereupon, and the plaintiff obtained a verdict, and whether the plaintiff should have full costs, or no more costs than damages was the question, for it was said, no title came in question upon the trial, for the way is admitted, and the issue is now, only whether he was guilty extra *viam*. *Sed per curiam*, the plaintiff shall have full costs, for first, there was a title to the way in question upon record, and so the case is out of the intent of the Statute; secondly upon this issue extra *viam*, a title to the way is in question of what extent the way is.—[*Parke, B.*—Is there not a case as to the construction of the Statute of *Charles*, since the 4 *Ann.*?] From the judgment of *Coleridge J.*, in *Smith v. Edwards* (e), it must be assumed, that the plea of not guilty, is now a special plea. In an action of

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(a) The Statute of *Eliz.* enacts, "that if upon any action personal, to be brought in any of her Majesty's Courts at *Westminster*, not being for any title or interest of lands, nor concerning the freehold or inheritance of any lands, nor for any battery, it shall appear to the judges of the same Court, and so signified or set down by the justices, before whom the same shall be tried, that the debt or damages to be recovered therein in the same Court, shall not amount to the sum of forty shillings or above, that in every such case, the judges and justices before whom any such action shall be pursued, shall not award for costs to the party plaintiff, any greater or more costs than the sum of the debt or damages so recovered shall amount unto, but less at their discretion." The Statute of


Charles, enacts, "that in all actions of trespass, assault, and battery, and other personal actions, wherein the judge at the trial of the cause, shall not find and certify under his hand at the back of the record, that an assault and battery was sufficiently proved by the plaintiff against the defendant, or that the freehold or title of the land mentioned in the plaintiff's declaration was chiefly in question, the plaintiff in such action, in case the jury shall find the damages to be under the value of forty shillings, shall not recover or obtain more costs of suit than the damages so found shall amount unto."

(b) 2 Doug. 779.

(c) *Barnes*, 339.

(d) 2 *Levinz*, 234.

(e) 4 *Dowl. P. C.* 621.

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assumpsit or debt, where the subject matter of the action is an interest in land, if that appeared upon the record, the Judge would not certify, but if it did not appear, he must certify to deprive the plaintiff of costs. The Statute of *Eliz.* looks to the subject matter of the action, and not the form of it. In *Wright v. Nuttall* (*f*). Lord *Tenterden* says, "the Statute in question, (43 *Eliz.* c. 6), ought to receive a liberal construction, so as to prevent the bringing of actions in the superior Courts for small sums; where less than 40*s.* is recovered the plaintiff cannot possibly derive any benefit from a suit in a superior Court, and such actions can only be brought for the benefit of the professional persons employed to conduct them." Where in an action of trespass, *quare clausum fregit*, an issue was raised on a plea of licence, and a verdict found for the plaintiff with 1*d.* damages, it was held that the Judge might certify under the 43 *Eliz.*, *Howard v. Cheshyre* (*g*). In an action on the case for injury done to the plaintiff's right of common, by digging turfs, there the judge may certify under the 43 *Eliz.* c. 6, for the interest or title of the land does not necessarily come in question, *Edmonson v. Edmonson* (*h*).—[*Parke*, B.—The difficulty under the Statute of *Eliz.* is, that upon this issue, the title must necessarily come in question, it appears from the case of *Peddell v. Kiddie* (*i*), that where there was a special plea of justification the plaintiff was entitled to full costs, though the damages were under 40*s.*]—*Wiffen v. Kinkard* (*j*), shews that the issue may be taken distributively; there the judge certified with respect to the imprisonment under the 43 *Eliz.* and refused to certify under the 22 and 23 *Car.* 2, to give the plaintiff full costs for the assault and battery: so where in an action for assault and battery there was a separate count for false imprisonment, and the judge certified under the 43 *Eliz.*, the Court refused to tax the plaintiff's costs, *Briggs v. Bowgin* (*k*). The rule is, that wherever the freehold necessarily comes in question, there the judge cannot certify, *Littlewood v. Wilkinson* (*l*). *Wright v. Piggin* (*m*) will perhaps be cited on the other side; that was an action of trespass *quare clausum fregit* with a count *de bonis asportatis*, the defendant pleaded the general issue, and accord, and satisfaction. The question at the trial was whether a term of years had expired, and the jury having found a verdict for less than 40*s.*, it was held the plaintiff was entitled to full costs. Other authorities are collected in 1 *Saund.* 300, *n. f.* In *Durmage v. Kemble* (*n*), which was an action of trespass for breaking and entering the plaintiff's dwelling-house, the defendant pleaded not guilty, and an entry to make a distress for rent arrear, a verdict was found for the plaintiff, with one farthing damages, and for the defendant on the second, and it was held, that the plaintiff was not entitled to costs without a certificate. In that case the freehold might have come in question. The plea of licence brings the case within the Statute of *Eliz.*

R. V. Richards, contrd.—The question is, whether the Court can distribute the pleading between the two Statutes. If the plea of licence alone had been pleaded, that would have taken the case out of the operation of the Statute

- (*f*) 10 B. & C. 499.
- (*g*) 1 *Ld. Kenyon*, 245.
- (*h*) 8 *East*, 294.
- (*i*) 7 *T. R.* 659.
- (*j*) 2 *N. Rep.* 471.

- (*k*) 2 *Bing.* 333.
- (*l*) 9 *Price*, 314.
- (*m*) *Y. & T.* 544.
- (*n*) 3 *Bing. N. C.* 538.

of *Charles*. "A plea that the plaintiff was not possessed," must have the same effect as a plea of *liberum tenementum*. This question was considered in *Littlewood v. Wilkinson* (o), which was an action for digging a ditch, and cutting down a tree with a count on an *asportavit*. The defendant pleaded not guilty, and *liberum tenementum*. The question at the trial was, whether the tree which had been cut down, grew upon the plaintiff's or defendant's ground. The plaintiff having obtained a verdict for less than 40s., it was held that he was entitled to full costs, for although the title to the freehold did not in act come in question, it might on the record so framed. In *Wiffin v. Kinkard* (p), there does not appear to have been a distribution of the pleas between the two Statutes, for it would seem the general issue alone was pleaded; *Smith v. Edwards* (q), is no authority, that the pleas may be taken distributively.

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Cur. adv. vult.

PARKE, B.—Now delivered the judgment of the Court. This was a motion to tax the plaintiff's costs, notwithstanding the judge's certificate under the 43 Eliz. c. 6. We have taken time to consider the case, and are of opinion, that the rule ought to be made absolute. It was an action for breaking and entering a stable, and taking away a horse and assaulting the plaintiff. There were several pleas, viz.: not guilty, that the stable was not the stable of the plaintiff, and leave, and licence, as to the breaking and entering; *fourthly*, as to taking the horse, that it was not the plaintiff's; *fifthly*, to the assault, *son assault demene*. The issues, on the four first pleas, were found for the plaintiff, and that on the last for the defendant, and the learned judge certified to deprive the plaintiff of costs. We are of opinion, that if there had been nothing but the general issue and licence pleaded, and the case had occurred before the new rules, the learned judge might have so certified, unless it appeared in evidence upon the general issue *on the trial*, that the title had come in question, which might have been the case on that plea, (independently of any statutory provision,) because it was a denial that the defendant had trespassed on the *plaintiff's* close, and put in issue the fact that it *was his close*, as well as the fact, that the defendant had entered it. Of that title, possession would be *primâ facie* evidence against all, and it would constitute *a good title against a wrong doer*, who, though the plaintiff had the actual possession, might have shewn that he (the defendant) was lawfully entitled. The plea of not guilty, however, did not *necessarily* raise a question of title, for the defendant might not really have contested it, and had no other mode of disputing the fact of the trespass than by pleading not guilty. The real nature of the question on the trial would, therefore, govern the certificate as it did in *Wright v. Piggin*, where the point in dispute was, whether a term had ended or not. But the plea denying *the close to be the plaintiff's* since the new rules, is a denial of the plaintiff's *title to the close*, to the same extent that he would have been obliged to prove it under the general issue, that as it is a denial of the possession, if defendant is a *wrong doer*, if otherwise, of a right to the possession, but in either sup-

(o) 9 Price, 314.
 (p) 2 N. Rep. 471.

(q) 4 Dowl. P. C. 621.

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position it is necessarily a denial of title, for even in the former case, possession is title against a wrong doer, and therefore the plea raises a question of title in the action, and prevents the judge from certifying. It was contended upon the part of the defendant, that the 22 & 23 Car. 2. s. 136 applies, and that the plaintiff is not entitled to more costs than damages, without a judge's certificate, for on these pleadings, the freehold or title might have come in issue, either on the plea of not guilty, (as it might by 11 Geo. 2, c. 19, s. 21,) on the plea that the stable was not the plaintiff's and it was said, he ought not to have full costs, unless the pleadings on the *whole record* precluded the possibility of the title coming in question, and that most of the cases in which it had been held, that a special plea of licence which shews that the title could not come in question, have arisen before 4 Ann, c. 15, and therefore do not apply to cases in which several pleas are pleaded, and if the matter were *res integra*, it would seem not unreasonable so to hold, but the weight of authorities is very great, in many cases since the Statute of Ann, wherever there is a special plea (which excludes all questions of title) found against the defendant, the plaintiff is entitled to full costs, that it is impossible now to decide otherwise. In *Peddell v. Kiddle*, the question was considered as finally concluded, and Lord *Kenyon*, said it would be dangerous to allow any innovations to be made on a point so thoroughly settled. We think the rule ought to be absolute. In future, defendants will be cautious in frivolous actions, how they put in issue the plaintiff's title.

Rule absolute.

BRIDGE v. GRAND JUNCTION RAILWAY COMPANY.

In an action for negligent management of a train of railway carriages, the defendant pleaded that the action arose as well from the negligence of the persons who had the management of the train in which the plaintiff was, as from the negligence of the defendant:—*Held*, that the plea was bad in substance as well as form.

THE declaration stated that before, and at the time of the committing of the grievance, &c., to wit, &c., the plaintiff was a passenger in, and by a certain carriage, forming part of a certain train of railway carriages, then being on a journey, on and by a certain railway, to wit, a railway commonly called the *Liverpool and Manchester* railway, and the said company was also possessed of a certain other train of railway carriages, then also journeying on, and by the said railway under the care and management of certain servants of the said company, nevertheless, the said company, by their said servants, carelessly, negligently, and improperly behaved, and conducted themselves in or about the management, controul, and direction of the said train, of the said company, that the same, by and through the default, carelessness, negligence, unskilfulness, and improper conduct of the said servants of the said company then to wit, on the day and year aforesaid, with great force and violence ran upon, and against the said train of carriages, in one whereof the plaintiff then was being carried as aforesaid, and struck against the same, by means whereof the said last-mentioned train was then very much injured, &c. The defendants pleaded, *secondly*, that before, and at the time of committing the said grievance, in the said declaration alleged, the said train of carriages, in one whereof the plaintiff was a passenger, did not belong to the defendants, nor was the same under the care and management of the defendants, or of the servants of the defendants, but under the care and management of

other persons. And the defendants further say, that before, and at the time when, &c. in the declaration mentioned, the said train of railway carriages of the said defendants were lawfully proceeding on the said railway and that the persons who had the management, controul, and direction of the said train of carriages, in one whereof the said plaintiff was then being carried, carelessly, negligently, and improperly behaved, and conducted themselves in and about the management, controul, and direction of the last mentioned train of carriages, and that in part by, and through the default, carelessness, or negligence, unskilfulness, or improper conduct of the last-mentioned persons, as well as in part by, and through the default, carelessness, and negligence, unskilfulness, and improper conduct by or on the part of the servants of the defendants in and about the management, controul, and direction of the said train, and the said defendants, that the said train of carriages, of the said defendants, ran upon, and against the said train of carriages, in one whereof the plaintiff then was being carried, and struck against the same, and occasioned the damage, wounds, lacerations, bruises, and injuries in the said declaration mentioned, and this the defendants are ready to verify, &c.

Special demurrer, assigning for cause, that the same amount to the plea of not guilty, otherwise the general issue, and is argumentative, and that the allegations therein, are respectively averments of evidence, and not of facts, and that, and the same consists of matter of law and not of matters of fact, on which any apt or material issue can be taken, and contains divers unnecessary and superfluous matters, and that the same concludes with a verification, and not to the country, and is in other respects bad, multifarious, defective, &c.

Cowling, in support of the demurrer.

Neville, in support of the plea, was called upon by the Court, and contended that the plea was good in substance and in form. The plea in substance, states that the persons having charge of the train in which the plaintiff was, were guilty of negligence. It is established in the case of collisions of ships, carriages, &c., that negligence or imprudence on the part of the plaintiff, is a good answer to an action. In *Vennal v. Gardner* (a), it was held, that neither party can recover, when both are in the wrong. The same principle will be found in *Pluckwell v. Wilson* (b), *Luxford v. Large* (c), *Vanderplank v. Miller* (d)

These cases shew that the plea is good in point of substance. Next as to the form. *First*, the plea is good as a confession and avoidance; it confesses a *prima facie* negligence, and avoids it by shewing negligence on the part of the plaintiff. The plea of not guilty, only puts in issue the collision, and not the negligence.—[Lord Abinger, C. B.—It puts in issue the negligence; the wrongful act charged in the declaration is the negligence, and that will be denied under not guilty.]—The plea is still supportable on another ground. Although the fact might have been given in evidence on not guilty, still as they raise a question of law for the Court, the plea is not bad on demurrer. There is this distinction in the books, viz: If the facts stated in a plea amount to a denial, and raise no question of law for the Court, the plea is

(a) 1 C. & M. 21.

(b) 5 C. & P. 375.

(c) 5 C. & P. 421.

(d) M. & M. 169.

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demurrable; if they raise a question of law, it is not demurrable. In *Birch v. Wilson* (e), which was an action for the disturbance of a right of common, it was pleaded, that *A.* being seized of such lands, with all common and emoluments to the premises belonging, or therewith used, conveyed them to the defendant, and that the tenants and occupiers of such lands, &c., have used to have common therein *virtute cujus*, he having right, did put his cattle in to take common there, and that there was sufficient common for the plaintiff and himself; and this plea was held good, although it amounted to the general issue.—[Lord Abinger, C. B.—In the case you have just cited, there was clearly a matter of law; there is none however in the present case.]—It is a matter of law, whether this plea is an answer to the action.—[Lord Abinger, C. B.—So it is a matter of law, whether the eldest son is heir of his father.]—In *Chambers v. Taylor* (f), which was a case in the nature of a conspiracy, for falsely and maliciously procuring the defendant to be indicted at the sessions, the defendant pleaded that he was possessed of the goods mentioned in the indictment, that they were stolen from him by persons unknown, whereupon he made search for them and found them in the plaintiff's house. So in *Payne v. Rochester* (g), it was held, that the *probable cause* may be specially pleaded to an action for a malicious prosecution.—[Lord Abinger.—There was matter of law as to the probable cause.]—In *Newton v. Creswick* (h), the plaintiff declared that the defendant exhibited a petition against him, before the King in counsel, by reason whereof, he was compelled to appear at a great expense, and that he was afterwards discharged of the matter alleged against him, which was the erecting of cottages in *Ringwood Chase*, in the county of *Gloucester*; the defendants pleaded that the case was injured by the erecting the said cottages, by the digging of pits, and by the making of a warren. Now here the matter of law is, whether the negligence of the person having charge of the carriage in which the plaintiff was, is not an answer to the action.—[Parke, B.—I doubt whether your plea is not bad in substance: if the plaintiff had negligently put his carriage in a wrong place, and the defendants had run against it, being able to avoid it by using ordinary care, that cannot be called plaintiff's negligence. In *Butterfield v. Forrester* (i), Lord Ellenborough states the rule to be, that although there may have been negligence on the part of the plaintiff, yet, unless he might by the exercise of ordinary care have avoided the consequences of the defendant's negligence, he is entitled to recover; if by ordinary care he might have avoided them, he is the author of his own wrong.

LORD ABINGER, C. B.—I think the plea is bad in substance.

PARKE, B.—I also think the plea bad in substance, for the reason I have already given; I think the rule is laid down with perfect correctness in the case I have already referred to.

Judgment for plaintiff.

(e) 2 Mod. 275.
(f) Cro. Eliz. 900.
(g) Cro. Eliz. 871.

(h) 3 Mod. 165.
(i) 11 East, 60

HODGSON v. DOWELL.

Eschequer.

ON the 12th of *December*, the defendant was arrested for 50*l.*, by order of *Gurney*, B., upon an affidavit, made by the plaintiff's attorney, which stated, that the said *William Dowell* did, on or about the 26th day of *November* last, commence pulling down, taking down and destroying; and from thence hath proceeded in pulling down and taking down and destroying the front and back parts, and the roof and tiling, and many other parts of the said shop, house and premises; and hath committed great waste and destruction to those premises; already amounting, *as this deponent has been informed, and believes*, to 63*l.* 11*s.*, at the least; and the said *William Dowell* hath carried away the materials and things arising therefrom, and appropriated the same to his own use.

On the 13th of *December*, application was made to *Parke*, B., at chambers, to rescind the order of *Gurney*, B., and to discharge the defendant out of custody, on entering a common appearance, on the ground of the insufficiency of the affidavit. It was objected that the affidavit should have been made by a surveyor, or some person competent to judge of the amount of the damage, and not by the plaintiff's attorney; and also that the amount of damages ought to have been positively sworn to. The learned judge having refused to interfere,

Hurlstone, on the 13th of *January*, made a similar application in Court, and obtained a rule, against which

J. L. Adolphus shewed cause upon an affidavit, that the defendant had applied for particulars of the damage, and had demanded a declaration. The rule of *H. T. 2 Wm. 4* (s. 33,) provides that "no application to set aside process or proceedings for irregularity shall be allowed, unless made within a reasonable time, nor if the party applying has taken a fresh step after knowledge of the irregularity." Here the defendant, by taking a step in the cause, has waived the alleged irregularity.—[*Alderson*, B.—The step taken by the defendant is collateral to the question arising on this motion. The defendant does not seek to set aside any proceeding, but only that he shall try the cause out of prison, instead of in prison. Wherever the setting aside proceedings would set aside a step which the party has himself taken, it is reasonable that that should preclude him.]—[*Parke*, B.—The demand of a declaration is to quicken the plaintiff's proceedings. Have you any authority that it is a waiver?—In *Powell v. Fisher* (a), the taking a step is explained to mean doing any thing to recognize previous proceedings as valid.—[*Lord Abinger*, C. B.—I have always understood the practice to be in favour of persons in prison.]—[*Parke*, B.—I should be very reluctant to say, that asking for particulars, is taking such a step in the cause as would preclude a defendant from objecting to the affidavit to hold to bail. The defendant being in prison, may want to know what the plaintiff is going for]

The defendant was held to bail in an action on the case in the nature of waste, upon an affidavit of the plaintiff's attorney, "that defendant had on a certain day commenced pulling down, taking down, and destroying, and from thence hath proceeded in pulling down, and taking down, and destroying, the front and back parts of the roof and tiling, &c., and hath committed great waste and destruction to those premises, already amounting, *as this deponent has been informed, and believes* to be, 63*l.* 11*s.*—*Held*, sufficient.

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Secondly, the affidavit is sufficient. Where the damages are unliquidated, it is impossible to swear to the *extent* of the damage, except by information and belief. A more positive statement is not required where, from the nature of the question, the party could only have a ground of belief, and could not make a direct assertion, *Hobson v. Cambell* (b). Perjury might be assigned on this affidavit, if the defendant had no reason to believe that such was the amount of damage. If a surveyor had sworn to the amount, he could only have spoken to the best of his knowledge and belief.—[*Parke, B.*—It has been decided, that the 12th *Geo. 1, c. 29*, applies only to arrests made by plaintiff himself, and not to those made under a judge's order (c).

Kelly and Hurlstone, contra.—First, the obtaining particulars of the damage, is not such a step as to preclude the plaintiff from objecting to the affidavit. It is entirely collateral to the subject of this application, and the demand of a declaration in no respect places the plaintiff in a different situation. Secondly, the affidavit is defective. Although the 12th *Geo. 1, c. 29*, may not be binding on the judges, yet they have made it the guide of their discretion, and have refused to make orders of this kind, unless satisfied that damage was done to an arrestable amount. Where from the nature of the case (as in cases of aggravated assault,) no specific damages can be sworn to, the judge forms his own opinion as to the amount of damage a jury would probably give; but here the damage might have been clearly ascertained, and positively sworn to. The only cases in which a party is permitted to swear to the best of his knowledge and belief, are those of executors and administrators, or the assignees of a bankrupt (d). Here the affidavit is made by the attorney of the plaintiff, and from any thing that appears, he may never have seen the premises. This statement would not form even a *prima facie* case for a jury.

LORD ABINGER, C. B.—The question is, whether enough is stated in this affidavit to justify the learned judge in holding the defendant to bail for 50*l.* The judges are to exercise their own discretion on such applications, and looking at the whole affidavit, form their own judgment as to the amount of damage. In the present case there is no difficulty in forming a probable conjecture as to the amount of the injury. The declaration states, “that the defendant, on the 26th of *November*, commenced pulling down, taking down and destroying, and from thence hath proceeded in pulling down and taking down, and destroying the front and back parts, and the roof and tiling, and many other parts of the said shop and premises.” It appears to me that the affidavit sufficiently shews the damage has been done to the premises; and deponent states, he believes it to amount to 63*l. 11s.* The adding that he is informed and believes, does not alter the estimate. A surveyor could have said no more; it is only a matter of opinion on inspection of the premises.

PARKE, B.—I am of the same opinion.

ALDERSON, B.—I think the principle of the case of executors and assign-

(b) 1 H. Bl. 249.

(c) *Omealy v. Newell*, 8 East, 364.

(d) 1 Tidd, 182.

nees governs this. The deponent has given as much information as he could reasonably be expected to give.

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GURNEY, B.—Concurred

Rule discharged with costs.

PARTRIDGE v. SCOTT and another.

THIS was an action of trespass on the case, and on the trial before *Alderson, B.* at the *Summer Assizes for Staffordshire*, in 1834, the jury found a verdict for the plaintiff, subject to the opinion of the Court, on the following case.

The declaration contained three counts. The first stated, that the reversion of certain messuages, dwelling houses, out-houses, yards, gardens, and closes, with the appurtenances, belonging to the plaintiff; the defendants, on the 1st day of *January*, 1830, and on divers other days and times, &c., so wrongfully, carelessly, negligently, and improperly, and without supporting or propping up the same, worked certain mines near to the said premises, and dug for, got, and removed the mines, minerals, and other produce of the said mines, to the support of which said mines and minerals for his said premises, the plaintiff was entitled, and which he of right ought to have had, and that by reason thereof, and by and through the carelessness and improper conduct of the defendants, the foundations of the plaintiff's said premises were thereby greatly weakened and injured, and the ground on which the same stood, swagged and gave way, and the walls, foundations, roofs, ceilings, joists, doors, and windows of the buildings on the plaintiff's said premises, and the earth and soil of the said premises were shaken, displaced, rent asunder, damaged, and spoiled, and sunk and fell; and the said buildings were in danger of falling down, and the said premises were thereby unfit for habitation or use, or cultivation respectively, and that the plaintiff had been put to great expense in repairing and endeavouring to repair the same, &c.

The second count referred to a certain other messuage, house, yard, garden, close, and premises in the occupation of the plaintiff, and was in all other respects similar to the first count. The third count was in trover for certain goods and chattels; to wit, earth, soil, rubbish, &c.

To this declaration the defendants pleaded separately, but the same pleas; that is to say, they pleaded, *First*, to the whole declaration, the general issue of not guilty.

Secondly, as to the working without supporting, or propping up the mines in the first count mentioned near to the messuages, dwelling-houses, and out-houses of the plaintiff, in that count mentioned, that the plaintiff was not entitled to, nor ought he of right to have had the support of the mines for his said messuages, dwelling-houses, and out-houses in the first count mentioned, nor any, nor either of them, nor any part thereof, &c.

Thirdly, a similar plea as to working without propping up the mines in the said first count mentioned near to the yards, gardens, closes, &c., in that count mentioned

A person who has built on the extremity of his own land, which has been previously excavated, has no right to support from his neighbour's land, unless a grant from the latter may be presumed. And, *semble*, that such grant cannot be presumed until after a lapse of at least twenty years from the time the owner of the adjoining land knew, or had the means of knowing, that the land had been so excavated.

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Fourthly, a similar plea as to working without supporting the earth, soil, ironstone, coals, and materials near to the messuage, dwelling-house, and out-houses in the second count mentioned.

Fifthly, a similar plea as to the working without supporting the earth, soil, ironstone, coal, and materials near to the yard, garden, close, and premises, in the said second count mentioned, and *sixthly*, and lastly, to the count in *trover*, that the plaintiff was not possessed of, as his own property, the said goods and chattels in that count mentioned.

The replication took the issue tendered in the above mentioned pleas.

The jury found that the plaintiff was possessed of a certain dwelling-house and premises partly erected upon excavated land, within four years before the injury complained of, being the house and premises to which the second count of the declaration referred, and of other houses, land, and premises, the buildings on which had been erected about thirty years before, and which were those included in the first count.

They also found that the defendants excavated so near their own boundary (the direction of which boundary was east and west), the mines belonging to themselves, as to cause damage thereby to all the plaintiff's premises, and to cause the adjoining land of the plaintiff, not covered with buildings, to sink also. The defendants began to work their mines after the new house and buildings of the plaintiff had been finished. They sunk their shaft, or pit, about one hundred yards from the plaintiff's premises, on the south side thereof, and worked the coal northwards towards those premises.

The jury also found, that in order to have prevented any injury from the defendant's works to the plaintiff's premises, a rib of coal ought to have been left between those parts of the substrata, over which the plaintiff's buildings and premises were situated, and the works of the defendants, at least twenty yards in thickness. That the defendants worked their mines, leaving a rib of coal in these places of less than *ten* yards in thickness; and that they were aware that the coal had been worked out some years before on the north, or plaintiff's side of their boundary, where the boundary had joined the plaintiff's premises. That in so doing, the defendants were guilty of negligence, in not leaving a rib of sufficient thickness, if the plaintiff was entitled to support from the defendants' land and substrata. The Court are to be at liberty to draw any reasonable conclusion that the jury should have drawn.

The question for the opinion of the Court is, whether under the above circumstances the plaintiff is entitled to recover. And if he is, then whether he is entitled to damages for the old houses and land alone, or for the more recent erections also. And it is agreed that the amount of damages shall be settled by arbitration, upon whichever principle this Court may direct.

If the Court shall be of opinion that the plaintiff is not entitled to recover, then a nonsuit, or verdict for the defendants, as the Court may direct, is to be entered.

W. J. Alexander for the plaintiff.—The jury have found the defendant guilty of negligence. There are no authorities as to whether a party has a right to support from the adjacent subsoil. In *Dodd v. Holme (a)*, the question was raised, but not determined, whether a party making an excava-

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tion on his own soil, close to his neighbour's land, which had been built on, is bound to see that his neighbour's foundations are not thereby weakened; but where it was allged and proved that the defendant so negligently, unskilfully, and improperly dug his own soil, that the plaintiff's house was thereby injured, it was clearly held, that an action would lie. In this case, it was proved that the defendant so negligently and unskilfully dug his own soil, that the plaintiff's house was thereby injured. It is true, that in *Wyatt v. Harrison* (b), it was held, that the possessor of a house which is not ancient, cannot maintain an action against the owner of the adjoining land for digging away that land so that the house falls in: but the Court intimated an opinion, that if it had appeared that the plaintiff's house was ancient, or if the complaint had been, that the digging occasioned a falling in of the soil of the plaintiff, to which no artificial weight had been added, an action might have been maintained. *Jones v. Bird* (c) shews that at all events the defendants were bound to give the plaintiff notice of their proceedings. *Trower v. Chadwick* (d), has considerably qualified the general principle that a party may do what he pleases with his own. There it was held, that the law imposed a duty on a party pulling down his own wall, to use due care and skill, and to take reasonable and proper precaution that his neighbour's wall was not injured. In *Vaughan v. Menlove* (e), it was held, that an action lay against a party for so negligently constructing a hay-rick on the extremity of his land, that in consequence of its spontaneous ignition, his neighbour's house was burnt. The observations with respect to the removal of the adjoining strata, apply with greater force to the subjacent strata, when there can be no knowledge that the work is going on.

Whateley for the defendant.—*Dodd v. Hull* cannot be considered as any authority, as it was decided on a colliateral point. It is true, that a party who so negligently conducts himself as to injure his neighbour's property, is liable to an action, *Jones v. Bird*; but here negligence is only an inference from the facts stated. There are several authorities to shew that in the case of a new house, the owner is not entitled to support from the adjacent soil. In 2 *Roll. Ab.* 564, tit. Trespass, 1 pl. I., it is said, "If *A.* be seised of copyhold land next adjoining the land of *B.*, and *A.* erect a new house on his copyhold land, and some part of the house is erected on the confines of his land next adjoining the land of *B.*, if *B.* afterwards digs his land so near the foundation of *A.*'s house (but no part of the land of *A.*) that thereby the foundation of the house, and the house itself fall into the pit, yet no action lies by *A.* against *B.*, because it was *A.*'s own fault that he built his house so near *B.*'s land, for he by his act cannot hinder *B.* from making the best use of his own land that he can, *Pasch. 15 Car. B. R.* between *Wild & Minterley*, by the Court after a verdict for the plaintiff. *Slingsby v. Barnard* (f), is to the same effect." In *Wyatt v. Harrison*, Lord *Tenterden* doubts whether twenty years gives a right to support from a neighbour's soil. The distinction between a new and an ancient house was first suggested in *Palmer v. Fleashees* (g). In *Stansell v. Jollard* (h), Lord *Ellenborough* held, that

(b) 3 B. & Adol. 871.

(c) 5 B. & Ald. 837.

(d) 3 Bing. N. C. 334; 2 Hodg. 267;
 3 Scott, 609.

(e) 3 Bing. N. C. 468; 3 Hodg. 51;
 4 Scott, 224.

(f) Vin. Ab. Action on the case (N. c.)

(g) 1 Sid. 167.

(h) 1 Sel. N. P. 444, 8th edit.

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"where a man had built to the extremity of his soil, and had enjoyed his building above twenty years, upon analogy to the rule as to lights, &c. he had acquired a right to a support, or as it were of leaning to his neighbour's soil, so that his neighbour could not dig so near as to remove the support, but that it was otherwise of a house, &c. newly built." There is no analogy between this case and that of ancient lights. The reason why a party acquires a right to light or water, &c. is, that it is an enjoyment exercised openly, and which the other party has the means of putting an end to. But here the plaintiff builds upon his own land: can he therefore at the end of twenty years prevent the defendants from mining on their land, on the ground that he has a right to support from it. Does the defendants' right to work their mines depend upon whether or no the plaintiff has got his minerals to the boundary? Where a party is himself in fault, he cannot recover although his neighbour is in fault also. In this case there are no facts from which the Court can presume any such grant. It is not enough to shew an injury by the act of the defendant, *Com. Dig. Action on the Case*, (B. 3) There is no statement that the defendants knew that the plaintiff's house was supported by this land,

Alexander in reply.—The defendants should have given the plaintiff notice that his property might be injured, *Jones v. Bird*. *Wyatt v. Harrison* is an authority that the plaintiff is entitled to recover for the falling in of the yard and gardens: *Brown v. Windsor* (i), is also in favour of the plaintiff.

Cur. adv. vult.

The judgment of the Court was delivered in this term by

ALDERSON, B.—The two questions in this case are of considerable importance. The facts may be shortly stated thus: the plaintiff was possessed of two houses, one an ancient one, and the other built long within twenty years before the subject of the present action occurred. These houses were built on the plaintiff's land, and considerably within his boundary; and the modern house is stated to have been built on land which had been previously excavated for the purpose of getting coal. No such statement appears in the case as to the ancient house, and the Court cannot, therefore, intend that that house was built originally on excavated land, or that the land has been excavated more than twenty years ago.

Under these circumstances the question is precisely similar as to both houses, and is one on which the Court do not entertain any doubt.

Rights of this sort, if they can be established at all, must, we think, have their origin in grant. If a man builds his house at the extremity of his land, he does not thereby acquire any right of easement, for support or otherwise, over the land of his neighbour. He has no right to load his own soil so as to make it require the support of that of his neighbour, unless he has some grant to that effect. *Wyatt v. Harrison* is precisely in point as to this part of the case, and we entirely agree with the opinion there pronounced.

In this case, if the land on which the plaintiff's house was built had not been previously excavated, the defendants might, without injury to the plaintiff, have worked their coal to the extremity of their own land, without even

leaving a rib of ten yards, as they have done. And if the plaintiff had not built his house on excavated ground, the mere sinking of the ground itself would have been without injury. He has therefore, by building on ground insufficiently supported, caused the injury to himself, without any fault on the part of the defendants, unless at the time he was entitled by some grant to additional support from the land of the defendants. There are no circumstances in the case from which we can infer any such grant as to the new house, because it has not existed twenty years, nor as to the old house, because, although erected more than twenty years, it does not appear that the coal under it may not have been excavated within twenty years; and no grant can at all events be inferred, nor could the right to any easement become absolute even under Lord *Tenterden's* Act until after the lapse of at least twenty years from the time when the house first stood on excavated ground, and was supported in part by the defendants' land.

If the law stood as it did before Lord *Tenterden's* Act (2 & 3 *Will.* 4, c. 71, s. 2,) we should say that such a grant ought not to be inferred from any lapse of time short of twenty years after the defendants might have been, or were, fully aware of the facts. And even since that act, the lapse of time under these peculiar circumstances would probably make no difference; for the proper construction of that act requires, that the easement should have been enjoyed for twenty years under a *claim of right*. Here, neither party was acquainted with the fact that the easement was actually used at all, for neither party knew of the excavation below the house. We should probably, therefore, have been of opinion that there was no user of the easement under a claim of right, and that Lord *Tenterden's* Act therefore, would not apply to a case like this. However, the facts of this special case do not raise that point.

We think, upon the whole, that the defendants are entitled to our judgment.

Judgment for the defendants.

CLARKE, Public Officer of the MANCHESTER and LIVERPOOL DISTRICT BANKING COMPANY v. SHARPE.

THIS was an action on a bill of exchange, for 200*l.* drawn by the defendant on one *Morris*, payable at four months' date, and indorsed to the *Manchester and Liverpool* Banking Company. The defendant pleaded that he had not due notice of the dishonour of the bill. At the trial before Lord *Abinger*, C. B. at the *London* Sittings after last term, it appeared that the bill was dated "*London*," 18th of *October*, 1836, and signed "*H. B. Sharpe*." The acceptor also resided in *London*, and his place of residence was stated in the acceptance. The bill was indorsed by the Banking Company to their correspondents, Messrs. *Smith, Payne, and Smith*, in whose hands it was at the time it became due and was dishonoured. Messrs. *Smith, Payne, and Smith*, communicated the dishonour of the bill to the Banking Company, and they on the 4th

Where a party drew a bill dated "*London*," (without any other address,) a notice of dishonour sent by the post, directed to the drawer "*London*," was held sufficient to go to the jury that he had had due notice of dishonour, although the

acceptor also resided in *London*, and his address appeared on the bill.

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February, put into the post office at *Manchester*, a letter containing a notice of its dishonour, addressed to "Mr. H. B. Sharpe, London." There was no evidence that the letter had reached the defendant, nor did it appear that the letter had been returned. It was submitted on the part of the defendant that this notice was insufficient; *Man v. Moors* (a) was relied upon by the plaintiff. The learned judge left it to the jury to say whether the notice had reached the defendant in due time. The jury having found for the plaintiff.

Thesiger moved, pursuant to leave reserved, to enter a nonsuit.—It does not appear that any diligence was used to discover the drawer's address. The residence of the acceptor being on the bill, application might have been made to him. It must be admitted that *Man v. Moors* is in favour of the plaintiff, but in *Walter v. Haynes* (b), Lord *Tenterden* held, that a notice addressed to the drawer at *Bristol*, was insufficient.—[*Parke*, B.—All that can be inferred from what Lord *Tenterden* there says, is, that such a notice is evidence to go to the jury. You should have given some negative evidence.]

LORD ABINGER, C. B.—In the course of my practice, I have constantly seen such evidence admitted. If a party draws a bill directed in so general a manner, it implies that a letter so addressed will reach him. Here the jury found that the notice actually came to the hands of the defendant.

PARKE, B.—The only question is, whether this was not evidence to go to the jury, that the letter had reached the defendant, and we have the authority of Lord *Tenterden* directly in point.

Rule refused.

(a) R. & M. 249.

(b) R. & M. 149.

FRANCIS v. ROOSE.

Declaration in slander stated that the plaintiff was clerk to a mining company, and that the defendant intending to cause it to be believed, that plaintiff had been guilty, in the course of his said employment, of grave crimes and felonies, heretofore, to wit, on the 1st July, 1836, in a discourse concerning the plaintiff, and of and concerning his having acted as such clerk, spoke of and concerning the plaintiff these words: "You have done things with the company for which you ought to be hanged, and I will have you hanged before the first of August" (thereby meaning that the plaintiff had been guilty of felonies punishable by law with death by hanging).—Held on motion in arrest of judgment, that the declaration was good.

SLANDER. The declaration stated, that before the committing of the grievances thereafter mentioned, the plaintiff had been, and acted as clerk to certain persons, to wit, the Marquis of *Anglesey*, and Lord *Dinorben*, owners and proprietors of a certain copper mine, and carrying on business under the name of the *Parys* Mine Company, and also before and at the time of the committing the grievance, the plaintiff had been and was, and acted as clerk to certain other persons, to whom the said Marquis of *Anglesey*, and Lord *Dinorben* had sold and assigned the said mine, and who also carried on business under the name of the *Parys* Mine Company, and that the plaintiff had always conducted himself honestly in the course of his employment as such clerk, and had never until the committing of the grievance, &c. been suspected, or believed to have been guilty of any offence punishable by law, yet the defendant well knowing the premises, but contriving and intending to injure the plaintiff, and to cause it to be believed that he had been guilty in the course of his said employment of grave crimes and felonies, punishable by

law, heretofore, to wit, on the 1st day of *July*, 1836, in a certain discourse then had, &c., of and concerning the plaintiff, and of and concerning his having acted as such clerk to the said Marquis of *Anglesey*, and Lord *Dinorben*, and to the said other persons called the *Parys* Mine Company, falsely and maliciously spoke and published of and concerning the plaintiff, and of and concerning his having acted as such clerk as aforesaid, the false, scandalous, malicious, and defamatory words following, that is to say, "You (meaning the plaintiff) have done things with the company (meaning the said Marquis of *Anglesey*, and Lord *Dinorben*, and the said other persons, &c. as aforesaid) for which you ought to be hanged and by G—I, (meaning the defendant) will have you hanged before the 1st of *August*." And in answer to a question then and there put by the plaintiff, as to what things he had so done, the defendant answered, "Many things," (thereby meaning that the plaintiff while he was and acted as such clerk as aforesaid, had been guilty of divers felonies, punishable by the laws of this realm, with death by hanging) by means whereof, &c.

Plea, not guilty.

At the trial before *Alderson*, B., at the last Assizes for *Anglesey*, the learned judge having left it to the jury to say whether they thought the defendant intended to impute to the plaintiff the commission of any offence punishable by law, they found a verdict for the plaintiff, damages 40*s*.

Jervis having obtained a rule to arrest the judgment, on the ground that the defendant could not have committed a capital offence as clerk, the 2 & 3 *W. 4*, c. 23, having abolished the penalty of death in cases of forgery.

Welsby shewed cause.—There is nothing to shew that a capital offence might not have been committed by the plaintiff as clerk, on the day laid in the declaration. The 2 & 3 *W. 4*, c. 23, abolished capital punishment for the forgery of bills of exchange, promissory notes, &c. but the forgery of powers of attorney, for the transfer of stock in the Bank of *England*, still remained a capital offence, and so continued until the passing of the 1 *Vic. 84*. It is possible the Company might have had stock in the Bank of *England*, and that the plaintiff might have forged a power of attorney for the transfer of that stock. But at all events, the date in the declaration being under a videlicet, is immaterial.

Secondly, the words are actionable *per se*, without a colloquium or innuendo, at least after verdict; it need not appear that any specific felony was imputed, *Blizard v. Kelly* (a) and *Curtis v. Curtis* (b), are precisely in point. There the words were, "You have committed an act for which I can transport you," and they were held actionable without any colloquium or innuendo. *Tindal*, C. J., says, "the defendant meant to impute the commission of an indictable offence as to transportation, he was merely mistaken in his law." The notion, that slanderous words are to be understood *in mitiori sensu*, has been long since exploded.—[*Parke*, B.—The words must be taken in the sense the bystanders understand them.] *Penfold v. Westcote* (c), *Peake v. Oldham* (d), *Com. Dig. tit. Defamation* (E. 1) are also authorities in point.

(a) 2 B. & C. 285; 3 D. & R. 519.
(b) 10 Bing. 477; 4 M. & Scott, 337.

(c) 2 N. R. 335.
(d) Cowp. 275.

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Jervis in support of the rule.—Although an innuendo which is insensible or impertinent may be rejected, yet you cannot reject the colloquium, by which the meaning of the words is explained. It is not enough that there is a mere inferential charge, but the charge must be of such a nature, that if the defendant demurs, there may appear a clear cause of action. Here the colloquium shews it to be impossible that the plaintiff could have committed a capital offence.

PARKE, B.—Suppose you strike out the innuendo at the end of the declaration, the words would be actionable as tending to injure the plaintiff in his present employment. It is by no means impossible that the words were spoken before either Statute passed, but if it be said that the innuendo must be proved, after verdict it will be intended that the defendant meant to impute felony. Besides, the plaintiff might have forged a power of attorney for the transfer of stock.

BOLLAND, B., concurred.

ALDERSON, B.—The innuendo may have a sensible meaning. The defendant not knowing the law, intended to impute a capital offence; whereas if he had known the law, he would have been aware that the Statute was repealed.

GURNEY, B., concurred.

Rule discharged.

ELLIOTT v. THOMAS and another.

Where there is a joint contract for several articles of different descriptions, an acceptance of any one of them is a sufficient part acceptance of the whole to satisfy the 17th section of the Statute of Frauds.

The defence that there was no sufficient contract within the Statute of Frauds, may be taken advantage of under the general issue.

ASSUMPSIT for goods sold and delivered, with a count on an account stated. *Plea*:—the general issue.

At the trial, before *Parke*, B., at the *Summer Assizes for Yorkshire*, it appeared that the plaintiff was a steel manufacturer at *Sheffield*, and that the defendants were edge-tool makers in *Birmingham*. On the 16th *November*, 1835, a traveller of the plaintiff took from the defendants a verbal order for thirty-five bundles of common steel, at 34s., and five bundles of cast steel, at 48s. The order was entered by the traveller in his book, but no memorandum was made to satisfy the Statute of Frauds. The steel was forwarded to the defendants at various times in the months of *December* and *January*. On the 10th *December*, the defendants wrote to the plaintiff for three hundred weight more of cast steel, and on the 10th *February* they wrote the following letter:—

Birmingham, 10th February, 1836.

“Sir—We are in want of the remainder of cast steel ordered, which we trust will be forwarded immediately. In your invoice of the 11th and 16th of *January*, you charge thirty-seven bundles of cast steel; we have only received thirty-four bundles from *Pickfords*, consequently, three bundles short.

We must again request that you will be careful to send it the right thickness, part of the last was wrong. Your attention will oblige yours respectfully,
"R. and G. Thomas."

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On the the 17th *February*, the plaintiff's tra eller again called on the defendants, when they told him they were afraid the steel was too hard, and begged him to state that fact to the plaintiff. They then paid the traveller 128*l.* 12*s.* on account, leaving a balance according to the invoice of 112*l.* 3*s.* 9*d.*, for which the defendants proposed to give a bill at twelve months, provided they received some allowance for the wrong temper of the steel; to this the traveller did not assent. On the 19th *March*, the defendants wrote to the plaintiff the following letter:—

"Birmingham, March 19th, 1836.

"Sir—There appears to be some common steel ordered, not yet sent, but which is much wanted; pray attend to this immediately and oblige yours respectfully

"R. and G. Thomas."

The plaintiff's traveller made two other applications for payment of the balance, which the defendants refused, stating, that the steel was of a wrong size.

It was contended on the part of the defendants, that there had been no acceptance of the cast steel, within the 17th section of the Statute of Frauds. The plaintiff's counsel objected that such defence was not available under the general issue. Evidence was afterwards adduced by the defendants to shew, that the cast steel was of too hard a temper for their use, and that the steel ordered on the 19th *December* was not of a proper thickness, and that in making experiments on its quality they had only used 13 lbs.

The learned judge left it to the jury to say; *first*, whether the steel supplied was fit for the edge tool trade; and *secondly*, if it were not, whether the defendants had agreed to accept it; and *thirdly*, whether more of it had not been used than was necessary to try its quality. The jury found that the steel was according to order, and that the defendants had used more of it than was necessary, and they gave a verdict for the plaintiff for 112*l.* 3*s.* 9*d.*

Creswell having obtained a rule *nisi*, to reduce the damages to 24*l.*, (the value of the steel mentioned in the order of the 19th of *December*;) or for a new trial, on the ground that there was no acceptance of the other steel to satisfy the Statute of Frauds.

Alexander and Wightman shewed cause.—The cast steel and the common steel were the subject of one entire order, and there was an acceptance of the latter. All that the Statute requires is that "the buyer shall accept part of the goods sold, and actually receive the same." There was also an acceptance of the cast steel, the letter of the 10th of *February*, being clearly a waiver of any objection as to the thickness. Then as to the temper, the defendants have no right to repudiate the steel on that ground, after having kept it so long, with every opportunity of making experiments. In *Percival v. Blake* (a)

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where the defendant had bought an article, and suffered it to remain on his premises for two months without examination, and then found that it was unfit for use, it was held that after that length of time he could not avail himself of the objection, in answer to an action for the price, unless it appeared that some deceit had been practised upon him as to the quality of the article. Besides, the jury having found that the defendants have used more of the steel than was necessary for experiments, they have assumed such a dominion over it as amounted to an acceptance, *Okell v. Smith* (b). In *Street v. Blay* (c), Lord Tenterden says, "Whatever may be the right of the purchaser to return a warranted article in an ordinary case, there is no authority to shew that he may return it when the purchaser has done more than was consistent with the purpose of trial."—[*Alderson*, B.—There, the purchaser had resold the horse, but suppose he had only ridden him further than in the opinion of the jury was necessary for trial, would that fix him with the price ?] At all events, there is sufficient proof of an acceptance, without the finding of the jury.

Creswell in support of the rule.—The first question is, whether the acceptance of the common steel operated as an acceptance of the cast steel also. It is submitted, that the acceptance contemplated by the Statute, is an acceptance of part of one entire thing of the same quality and character. A delivery of part never amounts to a delivery of the whole, unless the parties appear to have so intended it. In *Thompson v. Maceroni* (d), where goods of considerable value were made to order, and remained in the possession of the vendor at the vendee's request, with the exception of a small part which the vendee took away, it was held, that there was no acceptance of the residue within the Statute of Frauds.—[*Alderson*, B.—In *Price v. Lea* (e), where it seems to have been admitted, that there had been one entire contract for the two articles sold, (cream of tartar, and lac dye) the acceptance of one would have been an acceptance of both.] There it was unnecessary to decide the point. In *Hodgson v. Le Bret* (f), Lord Ellenborough ruled that the appropriation by the purchaser to his own use, of one of several articles bought at the same time in a shop, was not sufficient to take the other articles out of the Statute.—[*Parke*, B.—That case was overruled in *Baldney v. Parker* (g)].

PARKE, B.—The first question in this case, viz. whether there was a sufficient part acceptance of the goods ordered in *November*, to take the case out of the Statute of Frauds, is one of some importance, but none of the Court entertain any doubt upon it. The effect of the joint order for common steel and cast steel, unless explained, would be to make it one entire contract, since we must assume that one article would not have been supplied at the stipulated price, unless the other had been agreed to be paid for at the other price. There is no doubt that the common steel was accepted; the question then is, whether that acceptance is sufficient to take the case out of the Statute, as to the cast steel also. I am clearly of opinion that it is; the words of the Statute are, "that no contract for the sale of any goods, &c. for the price of

(b) 1 Stark. N. P. 107.
 (c) 2 B. & Adol. 456.
 (d) 3 B. & C. 1.

(e) 1 B. & C. 156.
 (f) 1 Camp. 233.
 (g) 2 B. & C. 37.

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ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept *part of the goods so sold*, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties, to be charged by such contract, or their agents thereunto lawfully authorised." Looking then at the words of the Statute, and assuming that there is but one contract, I am of opinion that there was an acceptance of part of the goods sold within the meaning of the Statute. Several cases have been cited by the defendants, for the purpose of shewing that this was not a sufficient part acceptance. In *Thompson v. Maceroni*, the Court held that the acceptance of a small portion of goods made to order, was not sufficient to entitle the seller to recover the price of the whole as for goods sold and delivered. But that case seems to me to have turned entirely upon the form of action. The plaintiff could not succeed unless there was a delivery of the whole, or at least an actual acceptance and receipt of the whole, so as to be equivalent to a delivery. *Hodson v. Le Bret* is greatly shaken by *Baldney v. Parker*, which shews that the contract in the former case ought to have been considered as a joint one. The case of *Price v. Lea*, referred to by my brother *Alderson*, is rather an authority the other way. *Holroyd, J.*, there says, "There was not then an entire contract for both the articles, so as to make the acceptance of one an acceptance of the whole." The inference therefore is, that if the contract had been entire, the acceptance of part would have been sufficient to take the case out of the Statute as to the whole. I am therefore of opinion, that there was in this case a sufficient part acceptance within the Statute, and that the defendant is responsible upon the joint contract, provided the articles were furnished according to order; but as we are not altogether satisfied with the propriety of the verdict in that respect, it will be better for the parties to enter into some compromise to avoid the necessity of a new trial.

BOLLAND, B.—I am of the same opinion. The case of *Hodson v. Le Bret*, is altogether inconsistent with *Baldney v. Parker*.

ALDERSON, B.—The words of the Statute appear to me to be quite conclusive. What are the "goods so sold?" the goods sold by that contract. If the contract be for two classes of goods, does not he who accepts one class accept part of the goods?

GURNEY, B.—I am of the same opinion.

Rule absolute, the damages to be reduced by consent to 24*l.*, the defendant undertaking to return all the steel complained of.

Exchequer.

RADFORD and others v. SMITH.

The declaration stated, that the sheriff had seized goods of the plaintiff under a *fi. fa.* issued upon a judgment, and signed by virtue of a warrant of attorney given by the plaintiffs and one *R.*, to one *S.*, as trustee for the defendant, and as security for monies due from the plaintiffs and *R.* to the defendant, and thereupon it was agreed, that the plaintiffs should give the defendant two several warrants of attorney for specific sums, and that the defendant should procure the goods and chattels to be re-delivered to the plaintiffs: that plaintiffs gave the warrants of attorney, but that the defendant did not cause the goods to be re-delivered. *Plea*, that the warrant of attorney in the declaration mentioned to have been executed by the plaintiff and *R.*, was not given for the use and benefit of the defendant, or to *S.* as his trustee: — *Held*, that the plea was bad, as traversing an immaterial issue. *Held*, also, that it was not necessary to set out the warrants of attorney, or to aver a request to re-deliver the goods.

ASSUMPSIT. The declaration stated, that before the making of the promise of the defendant thereafter mentioned, the Sheriff of *Middlesex* had seized divers goods and chattels of the plaintiffs of great value, to wit of the value of 200*l.*, under and by virtue of a certain writ of *feri facias* theretofore issued out of the Court of *Queen's Bench* in a certain suit in that Court, wherein one *Charles Stoddart* was plaintiff, and they the now plaintiffs, and one *John Hopkins Radford* were defendants, and which said writ of *feri facias* issued upon a certain judgment, theretofore signed in the said Court of *Queen's Bench*, under and by virtue of a certain warrant of attorney by them the now plaintiffs, and the said *J. H. Radford* theretofore to wit given and executed, whereby the now plaintiffs, and the said *J. H. Radford*, authorized the said judgment to be entered up, but which said warrant of attorney was then given and executed for the use and benefit of the now defendant, and to the said *Charles Stoddart*, as trustee for the now defendant, and as a security for monies at the time, and on the occasion of such warrant of attorney being given and executed as aforesaid, due and payable from the now plaintiffs and the said *J. H. Radford* to the now defendant, and which said writ of *feri facias* was directed to the Sheriff of *Middlesex*, and the said goods and chattels from thenceforth down to and until, and at the time of the making of the promise of the defendant continued, and were in the hands and custody of the said Sheriff of *Middlesex*, under and by virtue of the said writ of *feri facias*, and thereupon afterwards to wit on the 29th day of *April*, 1837, it was mutually agreed by and between the plaintiffs and the defendant in manner following, that the plaintiffs should give the defendant two several warrants of attorney, the one for the sum of 64*l.* 17*s.*, being the sum due and recoverable upon the judgment, upon and under which the said writ of *feri facias* was issued as aforesaid, and the other of such warrants of attorney for the sum of 34*l.* 3*s.*, being a sum of money which the said *J. H. Radford*, the father of the now plaintiffs, was then liable to pay to the defendants, and not a debt-claim or demand against them the plaintiffs, or any or either of them, and that the defendant should cause and procure the said goods and chattels of them the plaintiffs, to be re-delivered and given up to them. The declaration then alleged, that the two sums of 64*l.* 17*s.*, and 34*l.* 3*s.*, far exceeded the amount to be levied under the *feri facias*, and after averring mutual promises, stated, that in pursuance of the said agreement, the plaintiffs afterwards and at and within a reasonable and proper time in that behalf, and before the commencement of this suit, to wit, on, &c., did give to him, the defendant, the said two several warrants of attorney in the agreement mentioned and provided for, which he, the defendant, then took, accepted, and received of and from the plaintiffs; yet, the defendant not regarding his said promise, did not nor would then or at or within a reasonable and proper time in that behalf, although such reasonable and proper time elapsed before the commencement of this suit, or at any other time cause or procure the said goods and chattels of them the plaintiffs, or any of them, or any part thereof,

to be delivered or given up to the plaintiffs, by means of which premises the plaintiffs have wholly lost and been deprived of the said goods and chattels and every of them and the value thereof, &c.

Second Plea. That the warrant of attorney in the declaration mentioned, and therein alleged to have been given and executed by the plaintiffs, and the said *J. H. Radford* was not given and executed for the use and benefit of the defendant, and the said *C. Stoddart*, as trustee for the defendant in manner and form, &c

Special demurrer, on the ground that the plea put in issue a matter wholly immaterial.

Cowling, in support of the demurrer, was stopped by the Court, *Parke*, B., observing that it was immaterial for whose benefit the original warrant of attorney was given, since the two new warrants of attorney would constitute a good consideration for the return of the goods.

Mansel, contra.—There are two objections to the declaration; *First*, it does not set out the warrants of attorney. It ought to have been shown that they were instruments of such a nature as to be a benefit to the defendant, *Bolton v. Fenn* (a).—[*Parke*, B.—Supposing there had been a judgment by default, would the declaration have been bad on that ground, in arrest of judgment?]*—Secondly*, the declaration does not state any request to re-deliver the goods. Where the contract is merely to pay money, a request is not necessary, but in other cases, it must be alleged and proved.—[*Parke*, B.—There the contract is to procure them to be re-delivered, without any request.]*—In Bach v. Owen* (b), *A.* and *B.* had agreed to exchange horses, *B.* giving *A.* a sum of money to bind the bargain, and it was held on general demurrer in an action by *A.* against *B.*, for not delivering his horse, that the declaration was bad for not alleging a specific request.—[*Lord Abinger.*—Where by the terms of the contract, a request must precede delivery, or when a request is to be implied, it must be alleged and proved, but not otherwise. In the case cited, the plaintiff was not entitled to the horse, unless he offered his own, and demanded the other.]

Cowling, in reply.—As to the first objection, the declaration need not be more precise than the terms of the contract itself. With regard to the other points, the promise is, that the defendant will “procure the goods to be re-delivered;” and he is bound to do it within a reasonable time. It is only in the case of collateral engagements, in which a party promises to do an act on request, that an allegation of request is necessary. In the report of *Bach v. Owen*, the contract is not stated; but there is no doubt that the delivery was to be on request. Besides, it has been since held, that the allegation, “although often requested,” is good after verdict, or on general demurrer (c).

LORD ABINGER, C. B.—When a warrant of attorney is stated to have been given, it necessarily implies some value. The contract in *Bach v. Owen*, was most probably to deliver on request.

(a) 1 Lev. 257.
(b) 1 Sid. 415.

(c) 5 T. R. 409; See *Bowdell v. Parsons*, 10 East, 364;

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PARKE, B.—I have no doubt that upon these objections, the declaration is not bad on general demurrer. As to the first point, if you look at the contract, there can be no doubt of the meaning of the warrant of attorney. The contract is stated to be, that a certain warrant of attorney was given by the plaintiffs, authorizing judgment to be entered up; and it is then averred that in consideration that the plaintiffs would give the defendant two several warrants of attorney, for certain specific sums of money, the defendant would cause the goods to be re-delivered. It clearly appears by the terms of the contract, that they were warrants of attorney to enter up judgment. If the warrant of attorney be for the payment of a sum of money, that is a sufficient consideration. As to the objection that no request is alleged, the contract is absolutely to re-deliver the goods, and no request is necessary. The case of *Bach v. Owen*, is imperfectly reported, the contract must have been to deliver on request, or the objection would not have been taken.

BOLLAND, B. concurred.

Judgment for the plaintiff.

JONES, *qui tam*, &c. v. EDWARDS.

Amendments
may be made
in penal as in
other actions,
unless there
has been un-
necessary
delay.

THIS was an action of debt, to recover the penalty of 100*l.* from the defendant, for acting as a magistrate for the county of *Merioneth*, without being duly qualified. The declaration was delivered on the 26th *October*, and the venue was laid in *Middlesex*. On the 4th *November*, the defendant pleaded the general issue, and on the 8th *November*, the issue was delivered to the defendant's agent, with notice of trial, for the second *Sittings* in *Michaelmas Term*. The error in the venue having been discovered, on the 10th *November*, the defendant countermanded the notice of trial, and on the 13th, a summons was taken out to amend the declaration, by laying the venue in *Merionethshire*, instead of *Middlesex*, which was allowed upon payment of costs, the defendant to be at liberty to plead *de novo*. On the 22d *November*, the defendant delivered a special demurrer to the declaration, assigning for cause that it did not state what acts the defendant had done as a magistrate. The plaintiff, after twice obtaining time to join in demurrer, took out a summons, before *Gurney*, B., to amend the declaration, but the learned judge refused to make an order. A second summons was taken out before *Parke*, B., who ordered the proceedings to be stayed, until the fourth day of Term, that the plaintiff might apply to the Court.

Welsby, having obtained a rule *nisi* to amend the declaration.

Creswell, shewed cause upon an affidavit, that the defendant had a good qualification, and that the plaintiff was a person in indigent circumstances, and wholly unable to pay costs if he failed. It was contrary to the practice of the Court to allow amendments in penal actions.—[*Parke*, B.—In *Tidd's Practice* (a), it is stated, that there is no difference between penal and other

actions, unless there has been unnecessary delay. The only class of cases in which amendments are not allowed, are real actions, and even as to them, there are exceptions.]—The law allows less favour to a common informer; he must bring his actions within a certain time, and must lay the venue where the offence was committed. Besides, the plaintiff has not shewn that he has a meritorious cause of action. In *Matthews v. Swift* (b), which was an action against an attorney for penalties, for practising without having his name entered on the roll, the Court refused to allow the declaration to be amended after special demurrer. So in *Wright v. Ager* (c), which was an action against a sheriff's officer, for extortion; the Court refused to allow the declaration to be amended, by inserting counts on the 23 *Hen. 6*, c. 9. At all events, the amendment ought only to be allowed upon the terms of the defendant being at liberty to plead *de novo*, and the plaintiff giving security for costs.

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Jervis and *Welsby*, in support of the rule.—*Matthews v. Swift*, was decided upon the grounds that the plaintiff was not entitled to indulgence, because there had been unnecessary delay. Here the venue being in *Merionethshire*, there could be no delay. (He was then stopped by the Court.)

PARKE, B.—We all agree, that according to the rule acted upon in other cases, it is competent for the plaintiff to amend in a penal action, unless under very special circumstances, and one of those is unnecessary delay. The result is, that we think the amendment ought to be allowed upon payment of costs, the defendant to be at liberty to plead *de novo*, and the plaintiff undertaking to go to trial at the next Assizes. We should also be disposed to add, that the plaintiff give security for costs, but as there does not appear to be any precedent for it, we are unwilling to make one.

Rule absolute accordingly.

(b) 1 Bing. N. C. 735; 1 Scott, 706. (c) 5 Moore, 330.
1 Hodg. 175.

SMITH v. WINTER.

WALLINGER, moved for a rule *nisi*, calling on the plaintiff or his attorney, to produce for the inspection of the defendant a certain deed, to which the plaintiff was a party. The action was brought on a bill of exchange, and the defendant pleaded, that he was only liable as surety, and that the plaintiff had given time to the principal, (by the deed in question) without the consent of the defendant.—[Parke, B.—Is the defendant a party to the deed.]—Not an instrumentary party, but he is a party in interest.—[Parke, B.—The only cases in which an inspection is allowed, are where a party holds a deed as surety for another. In *Bateman v. Phillips* (a), the rule was granted on the express ground of the applicants being

Where to an action on a bill of exchange the defendant pleaded that he was only liable as surety, and that time had been given to the principal:—Held, that he was not entitled to inspect a deed in the plaintiff's possession, although it was suggested that time had been thereby given to the principal, the defendant being no party to the deed.

sion, although it was suggested that time had been thereby given to the principal, the defendant being no party to the deed.

(a) 4 Taunt. 157.

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parties in interest, though not instrumentary parties.—[*Gurney, B.*—You should give the plaintiff notice to produce the deed, and if he then refuses to produce it, you may give secondary evidence of its contents.]—In *Browning v. Aylwin (b)*, which was an action for negligence, the Court ordered the defendant to grant the plaintiff inspection of his book.

PARKE, B.—We do not think the defendant has such an interest as entitles him to inspect the deed. If he has no other evidence, he must file a bill of discovery.

Rule refused.

(b) 7 B. & C. 204.

ANGUS v. WOOTTON.

An execution creditor appearing under the Interpleader Act, need not produce an affidavit.

A RULE having been obtained by *Barstow*, under the Interpleader Act.

Rogers, for the claimant objected that the execution creditor could not be heard, inasmuch as he had produced no affidavit. He referred to *Powell v. Lock (a)*.

PARKE, B.—An affidavit is not required from the execution creditor. The case of *Powell v. Lock*, was that of a claimant.

(a) 3 A. & E. 314; 1 Har. & Wol. 281; 4 Nev. & Man. 852.

BENNION v. DAVIDSON and others.

The declaration stated, that defendants were owners of a certain vessel, and that plaintiff caused to be shipped on board thereof certain goods, to be safely carried by the defendants as owners of the said vessel; that the defendants promised the plaintiff safely to carry the said goods, as aforesaid.—*Held*, that under the plea issue, the ownership of the defendant was not admitted. A plea denying a particular fact does not admit other immaterial allegations.

THE declaration stated, that the defendants, before and at the time of making the promise thereafter next mentioned, were the owners and proprietors of a certain ship or vessel called the *Frodsham Trader*, then in a certain river near *Chester*, to wit, the river *Dee*, and bound from thence to *Liverpool*, and thereupon the plaintiff theretofore and before the making of the promise thereafter next mentioned, to wit, on, &c. at the request of the defendants, caused to be shipped and loaded in and on board of the said vessel, divers goods, to wit, 800 bushels of potatoes of great value, &c., to be taken care of and safely and securely carried and conveyed by the defendants as owners of the said vessel, from the said place of loading to *Liverpool* aforesaid, and in consideration thereof, and of certain freight and reward to the defendants in that behalf, they the defendants, promised the plaintiff to take due and proper care of and safely and securely carry and convey the said goods as aforesaid; and although the defendants then had and received the said goods to be taken care of and carried and conveyed as aforesaid, yet

the defendants not regarding their duty in that behalf, nor their said promise whilst they had the care and custody of the said goods for the purposes aforesaid, took so little and such bad care of the same, that by and through the negligence and improper conduct of the defendants in that behalf, the said goods became and were greatly injured and damaged, &c.

Pleas:—*First*, the general issue ; *Secondly*, that the defendants did take due and proper care of and safely and securely carry and convey the goods, on which issues were joined.

At the trial, before *Coltman, J.*, at the last *Liverpool* Assizes, the plaintiff proved that he shipped a quantity of potatoes on board the vessel mentioned in the declaration, which were damaged by the salt water having got into the hold. But there was no evidence of any express contract, or that the defendants were joint owners of the vessel. It was thereupon contended that the plaintiff ought to be nonsuited. The plaintiff's counsel submitted that the ownership was admitted by the plea. The learned judge directed a verdict for the plaintiff, with liberty to move to enter a nonsuit.

Creswell, having obtained a rule accordingly,

Wightman and *Addison* shewed cause.—The statement of the ownership is mere inducement, and is not in issue under this plea. The general issue denies only the promise, that is, it puts in issue whether the plaintiff delivered the goods to the defendant to be safely carried, and whether, in consideration thereof, the defendants undertook to carry them safely. The case may be illustrated by the example given in the new rule of a case of an action on a policy of insurance. There, the general issue operates as a denial of the subscription of the policy by the defendants, but not of the interest, the commencement of the risk, the loss, or the alleged compliance with warranty. So here, if the defendants had meant to deny their character as owners, they should have traversed that fact. In actions against carriers and other bailees, the general issue operates only as a denial of the contract of bailment, whether express or implied. In *Passenger v. Brookes* (a), which was an action on a special contract between a timber merchant and a builder, it was held, that want of consideration, or any other matter than a direct denial of the contract, could not be given in evidence under *non assumpsit*.—[*Parke, B.*—The true answer to the objection appears to be this ; that the allegation of ownership is immaterial.]—There is a distinct averment that the defendants received the goods to be taken care of by them *as aforesaid*, that is, by them as owners, which is not denied.

Creswell, contra.—Assuming the allegation of ownership be immaterial, that is sufficient to entitle the defendants to the nonsuit. There is no admission on the record which can be taken as proof of the contract. If, in order to establish the promise, it is not necessary to prove the ownership, the general issue does not involve it. A plea denying the ownership would have raised an issue altogether immaterial.

PARKE, B.—As to the effect of an admission on the record, it is not neces-

(a) 1 Scott, 560 ; 1 Bing. N. C. 587.

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sary to say more than that the taking issue on one fact alleged in the declaration, is only an admission of the other *material* averments. Here, there is no admission of the allegation of ownership, because that is perfectly immaterial. The declaration would be equally good if that averment were struck out: the statement, that in consideration that the plaintiff had shipped goods on board the vessel, and of the freight, the defendants promise safely to carry them, would have been quite sufficient, coupled with the allegation that the goods were not safely carried, to make out a complete case of liability against the defendants. The fact on issue under this plea, is, whether any such contract as alleged was made, and the plaintiff must prove that, either by shewing that the defendants made it themselves, or if the captain made it, that he was their agent. With respect to *Passenger v. Brookes*, it appears from the fuller report given by Mr. Scott, that the evidence was tendered for the purpose of shewing that there was no consideration for the agreement declared on, by setting up a prior agreement between the plaintiff and a third party, under which, the plaintiff was bound to do the same act which the declaration alleged he had agreed to do, as the consideration for the defendant's promise. That was not a denial of the contract declared on, but a sort of confession and avoidance of it.

BOLLAND, B, concurred.

ALDERSON, B.—It is evident that this averment being an immaterial one, was not admitted; but if it had been material, it would not necessarily follow that there was an admission of it as a fact to go to the jury.

GURNEY, B, concurred.

Rule absolute.

HARDING v. AMBLER.

The defendant purchased a policy of assurance sold by the plaintiff, subject to a condition that the purchaser should pay down a deposit of 20l. per cent, sign an agreement for payment of the remainder on the 8th June, 1835, but should the completion of the purchase

be delayed, the purchaser was to pay interest on the balance of the purchase money at 5l. per cent. per annum, from that day until the purchase was completed. The purchase was not completed until January, 1836, when the defendant paid the purchase money and interest, and the plaintiff then delivered to him an assignment of the policy, containing a release of the defendant from all claim in respect of the purchase of the policy, and all monies due to the plaintiff in respect thereof. It was afterwards discovered that the plaintiff's attorney had miscalculated the interest by 34l. —*Held*, in an action to recover this sum, that the release was a bar.

THIS was an action to recover certain interest claimed by the plaintiff on the sale of a policy of assurance purchased by the defendant. The declaration also contained a count on an account stated. The defendant pleaded, *First, non assumpsit*; *Secondly*, payment; and *Thirdly*, that after the purchase of the said policy of assurance, and before the commencement of the suit, to wit, on the 14th January, 1836, by indenture then made between the plaintiff of the one part, and the defendant of the other part, &c., the plaintiff acquitted, released, exonerated, and discharged the defendant of and from all claim and demand whatsoever, for, upon, or in respect of the said purchase of the said policy, and all monies due and claimable by him for, upon, or in respect thereof, and of and from the said supposed cause of action in the first count mentioned. The replications joined issue on the first and

second pleas, and as to the third, denied that the indenture therein mentioned was his deed.

The particulars of demand were as follows.—“This action is brought to recover the sum of 34*l.* for the balance due to the plaintiff from the defendant, on the sale of the policy mentioned in the declaration.”

At the trial before Lord *Abinger*, C. B., at the *London* Sittings after *Trinity Term*, it appeared that the plaintiff on the 8th of *May*, 1835, put up for sale a policy of assurance, effected on his life in the *Equitable Assurance Office*, under the following amongst other conditions: “The highest bidder to be the purchaser. The purchasers to pay down immediately a deposit of 20*l.* per cent, in part payment of the purchase money, and to sign agreements for the payment of the remainder on or before the 8th of *June*, 1835, but should the completion of the purchase be delayed from any cause whatever, the purchasers are to pay interest on the balance of their purchase money, at 5*l.* per cent. per annum, from that time until the purchases are completed.” The defendant became the purchaser of the policy for the sum 2290*l.*, paid the sum of 458*l.* by way of deposit, and signed a memorandum for payment of the residue of the purchase money. The purchase was not completed until the 22d of *January*, 1836, when the remainder of the purchase money was paid, together with interest at 5 per cent, as calculated by the plaintiff’s attorney, from the 8th of *June*, 1835, to the 14th of *January*, 1836, and a receipt was given for the same. The plaintiff’s attorney also delivered to the defendant an indenture of assignment of the policy dated the 14th of *January*, 1836, and having the plaintiff’s receipt for the whole purchase money indorsed upon it. It was subsequently discovered by the plaintiff’s attorney that he had miscalculated the interest by the sum of 34*l.*, for payment of which he applied to the defendant, who refused, and in consequence, the present action was brought. It was objected that the plaintiff was estopped from recovering by the indenture, containing the release set out in the plea. A verdict having been taken for the plaintiff with liberty to move to enter a nonsuit.

Erle obtained a rule accordingly, against which,

Kelley shewed cause.—The agreement to pay interest was collateral, and wholly independent of the final settlement and payment of the purchase money. The event, upon which the claim of interest arose, might never have happened. It is clearly no part of the purchase money, for if the purchase had been completed on the 8th of *June*, no interest would have been payable. The plea is that the plaintiff “released and discharged the defendant from the purchase money.”—[*Parke*, B.—The question is whether the interest is not a part of the purchase money.]—It is impossible to identify the two claims, and to say that interest is part of the principal. At the time the contract was made, the amount of the purchase money alone was payable. In the case of bills of exchange, interest is distinct from, and not incidental to, the principal. In *Lumley v. Hudson* (a), the plaintiff held a bill of exchange accepted by the defendant; when it became due, in *March*, defendant asked for time, and in *June* gave plaintiff another bill for the same sum, plaintiff telling him at the

(a) 4 Bing. N. C. 9.

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same time that something was due for interest, and continued to hold the first bill; the second bill was paid after it became due:—*Held*, that the plaintiff was still entitled to sue defendant on the first bill for the interest due on it. Here interest is more distinct from the principal, it is in the nature of a compensation for the delay in performing the agreement.

Erle in support of the rule.—The consideration for the assignment was the payment of the whole amount of principal and interest: if the defendant had sued the plaintiff for not completing the contract, he must have alleged his readiness to pay principal and interest. The deed must be taken most strongly against the party conveying, and if the intention of the parties is to be looked at, it is clear that the indenture was intended to be a release of all claim in respect to the transfer of the policy.

LORD ABINGER, C. B.—The release in terms only applied to the principal sum of 2290*l.*, and the question is, whether the plaintiff having executed a deed, stating that to be purchase money, can now give evidence of a parol contract, shewing that something more was to be paid. The conditions of the sale stipulated that the price of the policy is to be paid on the 8th of *June*, *plus* the interest, if not paid on that day. If the contract had been that the purchaser should pay the principal sum on the 8th *June*, nothing being said about the interest, and when that day arrived the parties entered into a new contract, that in consideration of further forbearance, interest should be paid, then *Mr. Kelly's* argument would be right, but this is a contract in which the interest forms part of the purchase money.

PARKE, B.—I am of opinion that this was an agreement to pay so much more for the policy, provided the purchase was not completed within a certain time. For the reasons given, I think the plaintiff has estopped himself from claiming any more upon the policy.

BOLLAND and GURNEY, Bs., concurred.

Rule absolute.

WRIGHTSON v. BYWATER and others.

By an order of reference, a cause was referred to an arbitrator, who was to settle all

THIS was an action of trespass, which came on for trial at the *Leicester Summer Assizes*, 1835, and was referred by order of *Nisi Prius* to an arbitrator, who was to settle all matters in difference between the parties at

matters in difference between the parties at law, and in equity, &c., so that he should publish his award by a certain day, (with power to enlarge the time), ready to be delivered to the parties, or if either of them should be dead, to their personal representatives, and the arbitrator was to be at liberty to make one or more awards at his discretion. At the time of the submission two suits in equity were pending, in which the parties to the action were interested, and in which certain infants were also concerned. Before an award was made, one of the parties to the equity suits died. The arbitrator made his award, whereby he ordered that a verdict should be entered for the plaintiff, damages 500*l.*, and that the defendants should pay the further sum of 350*l.* for grievances not included in the declaration:—*Held, First*, that the award was sufficiently final, although it did not dispose of the equity suits. *Secondly*, that it was not bad by reason of infants being parties to the suits. *Thirdly*, that the arbitrator's authority was not revoked by the death of *L.*, and *lastly*, that the award of 350*l.* for other grievances was sufficiently certain.

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law and in equity, and to order and determine what he should think fit to be done by either party respecting the matters in dispute, so as the said arbitrator should make and publish his award in writing, concerning the premises ready to be delivered to the parties, or *if either of them should* be dead before the making of the award to their respective *personal representatives*, who should require the same on or before the first day of *Michaelmas Term* then next. There was a power to enlarge the time for making the award from time to time, as occasion should require, and the arbitrator was to be at liberty to *make one or more awards at his discretion*. At the time of the submission, two suits in equity were pending, in which the parties to this cause were concerned, and in which certain infants were interested. On the first meeting before the arbitrator, a postponement of the reference was applied for, in consequence of the absence of the defendant's counsel. The arbitrator required as a condition of the postponement, that the defendants should place in a banker's hands, the sum of 730*l.*, to abide the event of the award, which was accordingly done. The time for making the award was duly enlarged, until the first day of *Michaelmas Term*, 1836. In the mean time, *Thomas Linaker*, a plaintiff in one of the equity suits, died. In *June*, 1836, the arbitrator made his award, whereby, after reciting the order of reference, he ordered and directed that a verdict should be entered for the plaintiff upon all the issues, damages, 500*l.*; and he further ordered, that the defendants should pay or cause to be paid to the plaintiff, the said sum of 500*l.*, as well as the further sum of 350*l.*, which he awarded to be paid by the defendants to the plaintiff, as damages *for grievances not included in the plaintiff's declaration*. In *Michaelmas Term*, 1836, a rule was obtained for setting aside the award on several grounds; *First*, that it was not final, not having disposed of the suits in equity; *Secondly*, that the infant parties to those suits were not bound by the legal submission; *Thirdly*, that the submission was revoked by the death of *Linaker*; and *lastly*, that the award of 350*l.* for other grievances, was not sufficiently certain. That rule, however, was discharged. Judgment having been afterwards entered upon the award, and execution sued out for the balance awarded beyond the 730*l.*; a rule *nisi* was obtained for setting them aside, on the above mentioned grounds; against which,

Goulburn, Serjt., and Humfrey, shewed cause.—The award is sufficient, although the equity suits *are* not disposed of, the arbitrator having express power to make one or more awards. As to the objection that there are infant parties to the equity suits, the provision enabling the arbitrator to make several awards, was expressly intended to meet that difficulty. Then the clause providing for the delivery of the award to the personal representatives of the parties, prevented the death of *Linaker* from operating as a revocation of the arbitrator's authority, *Clarke v. Crofts (a)*. The award of 350*l.* is sufficiently specific.

Sir *W. W. Follett*, and *Hoggins, contra*.—*First*, the suits in equity as well as law, were all referred upon the terms of the arbitrator making his award by a certain day. He cannot now make any further award, as he has omitted to

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enlarge the time for that purpose. If this award be good, he might have awarded on any one subject, however minute, omitting the rest. The true construction of the clause enabling the arbitrator to make several awards is, that he may make awards, regulating their proceedings in the mean time, before he makes his final award. The determination of these suits in equity might have rendered unnecessary the award as to the 350*l*. It is clear the consideration for the submission, was that all matters should be determined. There are numerous authorities to the effect, that awards are bad, which do not determine all matters referred, *In re Tribb (b)*, and the cases there cited.

Secondly, the submission was not mutual, because the infants were not bound, *Biddell v. Douce (c)*, in that case the order of reference contained a similar clause, enabling the arbitrator to make one or more awards. An award cannot be binding, unless there be a previous binding submission, *Marsh v. Wood (d)*, *Pearse v. Pearse (e)*, *Hayward v. Phillips (f)*.

Thirdly, the death of *Linaker* operated as a revocation of the arbitrator's authority. *Linaker* may have been a party to the matters in difference, not included in the action, upon which the arbitrator has awarded. The objection is not cured by the clause for the delivery of the award to the personal representatives. In the case of a dispute as to a particular chattel, the executor would not be bound. No attachment could be obtained against him if he refused to perform the award. In *Marsh v. Wood*, Lord Tenterden, C. J. observes, that "if by matter *ex post facto*, a submission becomes ineffectual as to one party, it must be altogether void.

Lastly, the award of 350*l*. for other grievances, is uncertain ; it does not state what the grievances were.—[*Parke, B.*—The Court has no doubt as to this point. This part of the award is only between the plaintiff and defendant in the action, and the nature of the grievances would appear by parol evidence before the arbitrator ; and for those grievances, the plaintiff is entitled to 350*l*., and no more.

The judgment of the Court was now delivered by

PARKE, B.—This was an application to the Court to set aside a judgment, entered up pursuant to an award on a submission by rule of Court, and a *fi. fa.* thereon, and for a return of a part of the money deposited with the sheriff upon the execution of the *fi. fa.* The case has been several times before the Court in its earlier stages ; and last of all, upon a motion to set aside the award, which the Court refused, the majority intimating a strong opinion that it was good, but deciding merely, on that occasion, that it ought not to be set aside, but the parties left to contest its validity, where that necessarily would come in question. On this application to set aside the judgment and execution, we must determine the validity of the award, for there is no other way than by this motion, in which the defendants can contest the legality of that judgment and execution. We are of opinion, that under the circumstances of this case, the award is good.

It appears from the affidavits, that this action stood for trial at the *Summer Assizes*, 1835 : that besides the subject of it, there were other matters in dis-

(b) 3 A. & E. 295.

(c) 6 B. & C. 255 ; 9 D. & R. 404.

(d) 9 B. & C. 659.

(e) 9 B. & C. 484.

(f) 1 Nev. & P. 288.

pute between the parties to the action; and there were also pending two suits in equity, *Linaker v. Lacey*, and *Lacey v. Lacey*, in which suits, infants were concerned; but who were the parties to these suits (except that one *Thomas Linaker* was a plaintiff in one), or in what way those suits were connected with the subject of the action does not appear, and therefore we cannot assume them to have any connexion, except so far as appears by the submission to the reference hereinafter mentioned. When the cause came on for trial, an order of reference was made, of which this is the substance. [His Lordship stated the order]. Soon after this, the defendants deposited 730*l.* to abide the reference, and by their attorney, attended the prior and subsequent meetings. On the 27th *December*, 1835, *Linaker* died.

On the 17th *June*, 1836, the arbitrator made his award. [His Lordship read the award]. After this award, the 730*l.* was received by the plaintiff, and judgment was signed, and execution issued for the balance awarded and costs.

The objections to the award, were; *First*, that it was not final because the chancery suits were not disposed of; *Secondly*, that the submission was not mutual, because infants were parties, and were not bound, nor could be. *Thirdly*, that it was revoked by the death of *Linaker*, one of the parties; and *Fourthly*, that it was void as to the 350*l.* awarded for other grievances as not being sufficiently certain. The last of the objections was disposed of during the argument, and it is unnecessary to say anything more upon it.

With respect to the other three, the first is wholly founded on the assumption, that in order to make the award valid, it is necessary that every matter in difference should be decided by it, and if that assumption is incorrect, the objection fails. The other two depend *mainly*, but not *entirely* on the same assumption. The death of *Linaker* affects only the authority to determine that suit in which he was a party; and therefore, even supposing that notwithstanding the clause in the submission providing for the death of any party, the power to award upon that suit is revoked; yet, if an award upon that suit be not essential to the validity of the award; on other matters, the award may nevertheless be good. So in like manner, if the determination of those matters in which the infants have an interest be not necessary to the decision of those in which they have none, the want of such decision would be immaterial. If it be said that it was a part of the consideration for the defendant's promise to refer the suits and the actions, that the arbitrator should have a *continuing power* to decide all the suits, the answer is, that such was not the case, for all the parties contemplated that the reference should go on, notwithstanding the death of a party of which the express provision, binding the executors, is a proof whether that provision would be effectual or not to make an award, in that particular suit, valid. So if it be argued, that the agreement on the behalf of all the parties to all the suits to give the arbitrator power to decide, was also a part of that consideration, and that the want of a binding consent of the infant parties caused the failure of the consideration, the answer is, that all parties well knew that there were infant parties, and as they must be presumed to know the law, they knew *they* were not bound by the attorney's consent on their behalf, and therefore, they had all the consideration which they had stipulated for, and the consent of those parties, who could and did consent, was a sufficient consideration, in point of law, for their promise.

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The question therefore is reduced to this, whether under this reference it is necessary to the validity of any award to be made pursuant to it, that it should decide all the matters in dispute. And this is a mere question of construction, for there is no rule of law requiring it; its necessity arises from the contract of the parties. The old rule was, that unless the submission expressly made it conditional, with an "*ita quod*," an award of part only was good. This was laid down by Lord Coke, in *Ormelade v. Coke* (g), and it was so held in *Dyer*, 242 b., *Baspole's Case* (h), and many other cases. In more modern cases it has been said, that an *express* condition is not required, for in *Bradford v. Beavan* (i), C. J. Willis says, "I am willing to carry it as far as it has been carried already, because were it not for the cases, I should be of opinion that when all matters are submitted, though *without such condition* all matters must be determined, because it was plainly not the intent of the parties, that some matters only should be determined, and that they should be left at liberty to go to law for the rest." But beyond this the cases have not gone, and it is still the question whether the parties intended all to be decided. In *Simmonds v. Swain* (j), *Chambre, J.* says, "a great deal of nicety prevailed in the old cases, respecting awards, but the rigour of that interpretation has for a long time been gradually relaxing, and the Courts are now come to a mode of considering them more consonant to common sense. But even in the earlier cases, so long since as in *Rolle's Abridgment, Arbitrament*, L., it was in some cases held that unless there was a clause "*ita quod fiat de præmissis*," it was sufficient to make the award good that one point was decided, provided that it was not necessary in order to make the award just, that the others should be decided also. In the case of *Payne v. Cook*, adjudged many years since in the *Exchequer Chamber*, many points relating to awards were decided on, and amongst others, this general doctrine was strongly laid down; that as there was no clause in the submission, providing that the award should be made on all points submitted, if the matters omitted were not necessarily dependent on and connected with the other points, the award should be sustained."

The point to be decided then is, whether this submission requires the award to be made of all matters in dispute. In ascertaining its meaning every part is to be construed together; and when we find a clause that the arbitrator is to have power to make "*one or more awards* at his discretion," we cannot doubt but that the arbitrator might make a valid award, on one entire subject of dispute. For it cannot be supposed that such separate awards when made, were not intended to be binding from the time they were made; it is impossible to imagine they were to be ambulatory till the last was made; and the case is very different from that of a reference, with power to regulate the intermediate enjoyment, or to give directions respecting the intermediate management of some subject of dispute, which from their very nature are meant to have a temporary operation only. This is a provision that the arbitrator may make one, or more final awards.

We therefore think that in this case the parties have given the *power* to the arbitrator, to dispose of all matters, but have not made it a *condition*, that all matters should be disposed of by him.

(g) Cro. Jac. 355.
 (h) 8 Coke, 98.

(i) Willea, 270.
 (j) 1 Taunt. 554.

The only case necessary to be considered, and which is in any degree opposed to this view of the question, is that of *Biddell v. Dowse*, where in fact there was a similar clause in the agreement of reference. But it is quite enough to say, that this point was not argued or considered in the Court of *King's Bench*, and we cannot take the judgment as a binding authority, upon a point which was not brought before the Court. The rule therefore will be discharged.

Rule discharged.

Mogg and another, Assignees of PURNELL, an Insolvent Debtor, v. BAKER.

ASSUMPSIT for money had and received to the plaintiffs' use, as assignees, and on an account stated with them. *Plea*:—*Non assumpsit*. At the trial before *Tindal, C. J.*, at the last *Bristol Assizes*, it appeared that in the Spring of 1835, the insolvent became tenant of the defendant, of an inn at *Clevedon*. At the time that he took possession of the premises, furniture had been supplied to the value of 170*l.* which was paid for by the defendant, and it was agreed that *Purnell* should give him a bill of sale of goods and furniture, as a security for the advance. In *July*, 1836, the defendant delivered his account to *Purnell*, amounting in the whole to 403*l.*, including the 170*l.* for furniture; and on the 12th *July*, *Purnell* executed a bill of sale to the defendant of all his household goods, furniture, wines, &c., and gave a warrant of attorney to secure the amount. On the 24th *September*, the property on the premises was sold by the defendant's directions, and produced the sum of 249*l.* *Purnell* was subsequently arrested at the suit of another creditor, and obtained his discharge under the Insolvent Debtors' Act. It was proved that before the 12th *July*, *Purnell* had expressed his desire to give the defendant security, but that the defendant had made no application to him to execute the bill of sale until that day. The action was brought to recover the proceeds of the sale, it being alleged that the bill of sale and warrant of attorney were void under the 32d section of the 7 *Geo. 4, c. 57*. A verdict having been found for the plaintiff, the amount of damage to be settled by an arbitrator.

Bompas, Serjt., in *Michaelmas Term* obtained a rule *nisi* for a new trial, on the ground that by the agreement made in 1835, an equitable mortgage of the furniture had been created, and therefore the assignees were not entitled to recover.

Crowder and Barstow shewed cause.—This was clearly a voluntary transfer, and having been made within three months before the commencement of the imprisonment, is void under the 32 section of 7 *Geo. 4, c. 57*. [*Parke, B.*—The rule was granted on the ground that the arrangement that a bill of sale should be given to the defendant as a security for the price of the furniture, operated as an equitable mortgage, which would prevent the furniture from passing to the assignees.]—Until the bill of sale was given, the whole agreement rested in contract. The term "voluntary" means with-

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The assignees of a bankrupt, or insolvent, take such property only as he was equitably as well as legally entitled to at the time of the bankruptcy or assignment; therefore, if A. agree to assign certain specific goods as security for money advanced, and afterwards take the benefit of the Insolvent Debtors' Act, having within three months before the imprisonment "voluntarily" assigned the goods in pursuance of such agreement, the assignees are not entitled to recover them, but if the agreement had been to assign such goods as he might have at the time of the execution of the assignment, the assignees would be entitled to them.

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out pressure, or as a witness stated "spontaneous," *Stuckey v. Drewe (a)*, *Arnell v. Bean (b)*, *Margareson v. Saxton (c)*.—[*Parke, B.*—*Stuckey v Drewe* may be considered as overruled so far as it appears to decide that a *bonâ fide* conveyance, in consideration of an advance of money, is voluntary, because made on the mere motion of the insolvent. In the present case, if there was an equitable assignment of the furniture, the plaintiffs are not entitled to recover, because the assignees either of a bankrupt or of an insolvent are only entitled to that property to which he has both a legal and an equitable right. If this has been an agreement to execute at a future day a bill of sale of all the goods that the insolvent might then have, it would not be an equitable assignment, but it would be such, if it had related to certain specific furniture, *plus* the goods that he might then have in his possession.]—The bill of sale included the insolvent's other goods, in addition to the furniture which had been supplied by *Carter*, and for those goods the assignees would be entitled to recover.

Erle and *Bompas*, in support of the rule, were stopped by the Court.

PARKE, B.—As the amount of damage has been referred, it is better that the whole matter should go before a legal arbitrator. The arbitrator will take the law to be that which is laid down by the Court, viz. that if the agreement was to mortgage certain specific furniture, of which the *corpus* was ascertained, then the defendant would acquire an equitable title, which would prevent the property from passing to the assignees, and the execution of the bill of sale would convert that equitable title into a legal *one*; but if it was only an agreement to mortgage furniture to be subsequently acquired, then no right in equity would be conferred. I have had an opportunity, during the argument, of consulting a very high authority, and it must be taken that the rule in equity is as I have stated it. If the parties object to refer, there must be a new trial.

Rule accordingly.

(a) 2 Myl. & K. 190.

(c) 1 Y. & Col. 530.

(b) 8 Bing. 87; 1 M. & S. 157.

Earl SPENCER v. SWANNELL.

Nil debet is a good plea to an action of debt on the 2 & 3 Edw. 6, c. 13, for treble value for not setting out tithes.

DEBT on the 2 & 3 Edw. 6, c. 13, s. 1, for the treble value of tithes not set out. *Plea*:—*Nil debet*. *Special demurrer*, assigning for cause, that the plea of *nil debet* is not allowable in any action.

Newman, in support of the demurrer, was stopped by the Court.

Henderson, in support of the plea.—*First*, the rule of Court applies only to actions of contract. In *Faulkner v. Chevell (a)*, which was an action of debt on the 22 Geo. 2, c. 46, s. 14, against a deputy clerk of the peace for practising as an attorney, *Littledale, J.* says, "The rules were never

(a) 5 Adol. & E. 213; 2 Har. & Woll. 183.

meant to apply to these cases, and if they do, it was an oversight in drawing them up." If the defendant had pleaded "that he never was indebted in manner and form as in the declaration alleged," that would be no answer to the action, such plea being the same in effect as the plea of *non assumpsit* in *indebitatus assumpsit*; that is, it operates only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which they may be implied by law. It is clear, that this count is not founded on any contract, express or implied. Lord Coke, speaking of this form of action, observes, that "this action of debt is no action of debt within the Statute of 23 Hen. 8, because it is neither upon a specialty, or by contract; neither is this action upon this Statute any action for any wrong personal, immediately done to the plaintiff, for it is a nonfeazance, viz. a not setting out of tithes; *Trin. 42 Eliz. in Communi Banco*, adjudged in action for treble value upon this Statute; not guilty or *nil debet* are good pleas, and so upon the Statute 5 Eliz., upon perjury." (b). The case referred to is, doubtless, that of *Wortley v. Herpingham* (c), where it was held, that "in action upon the Statute, which prohibits a thing upon which a penalty is demanded, the issue may be *non culpabilis* or *nil debet*." *Johns v. Carne* (d), and *Bawtre v. Isted* (e), are to the like effect. It is because this is not a debt *ex contractu*, that no action will lie against an executor for the act of his testator in not setting out tithes, *Moreton v. Hopkins* (f); and for the same reason, the Statute of Limitations is not pleadable, *Talory v. Jackson* (g).

Secondly. This case falls within the proviso at the end of the first section of the 2 & 3 W. 4, c. 42, by which no rule or order is to have the effect of depriving any person of the power of pleading the general issue and giving the special matter in evidence, in any case in which he is now or hereafter shall be entitled to do so, by any Act of Parliament. The plea of *nil debet* is given by the 21 Jac. 1, c. 4, s. 4, which enacts, "that if any information, suit, or action, shall be brought or exhibited against any person or persons for any offence committed or to be committed against the form of any penal law, either by or on behalf of the king, or by any other, or on the behalf of the king and any other, it shall be lawful for such defendants to plead the general issue, that they are not guilty, or that they owe nothing, and to give such special matter in evidence to the jury that shall try the same, which matter, being pleaded, had been a good and sufficient matter in law to have discharged the said defendant against the said information, suit, or action, &c." It is true, that the first section applies to *qui tam* actions only, and the second and third appear to be in furtherance of the first clause, but the language of the last section is sufficient in terms to include a case of this kind. This is strictly a penal action. In *Radford v. McIntosh* (h), Lord Kenyon says, penal Statutes are defined to be "such Acts of Parliament whereby a forfeiture is inflicted for transgressing the provisions therein contained." *Nil debet*, or not guilty, was pleadable before the Statute of 21 Jac. 1, c. 4, but until the passing of that Act, it would operate as a denial only, and would not let in the special matter.

Thirdly, supposing the plea bad, it does not necessarily follow that this is the form in which the objection is to be taken. The plaintiff should have

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(b) 2 Inst. 631.
(c) Cro. Eliz. 766.
(d) Cro. Eliz. 621.
(e) Hob. 218.

(f) 2 Keh. 502; 1 Sid. 407.
(g) Cro. Car. 513.
(h) 3 T. R. 635.

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applied to the Court or a judge to set it aside. Where the failure to observe a prescribed mode of pleading is intended to be the subject of demurrer, it is so stated in the rule, as in the case of setting out the abutments in an action of trespass *quare clausum fregit*.—[Parke, B.—If the plea be bad, the objection may be taken on demurrer.]

Newman, contra.—Before the Stat. 21 Jac. 1, the pleas of *nil debet*, or not guilty, were good pleas. It is said, that the rule applies only to actions of contract; but nothing can be more general than the terms of the fourth rule: "in other actions of debt in which the plea of *nil debet* has been hitherto allowed, including those on bills of exchange and promissory notes, the defendant shall deny specifically some particular matter of fact alleged in the declaration, or plead specially in confession and avoidance."—[Parke, B.—The real question is whether, supposing this case comes within the words of the rule, we had any power to take away a plea given by Statute. It was, no doubt, the intention of the framers of the rule, to take away the plea of *nil debet* wherever it could be done; but had they any power to do so in the present case?—The stat. 2 & 3 Edw. 6, c. 13, is a remedial and not a penal Act. The defendant's right to plead *nil debet* is not given by the Statute of James, but existed at common law. That Statute applies only to actions by the king, or at the suit of a common informer. The 31 Eliz. c. 5, *in pari materia*, which limits the time within which penal actions may be brought, has been held not to apply to actions by the party grieved, *Calliford v. Blawford* (i). In *Selw. Nisi Prius* (j) it is said, "An action on this Statute (2 & 3 Edw. 6, c. 13) being brought by the party grieved for the purpose of trying a right, and being a more beneficial remedy to the defendant than to be carried into the Spiritual Court, is not considered as a penal action brought by a common informer; consequently, a new trial will be granted where it is clear that a verdict has been given for the defendant against the weight of evidence, although in penal actions the Courts will not permit a verdict for the defendant to be disturbed on this ground." In *Bones v. Booth* (k), which was an action on the 9th Anne, c. 14, for preventing excessive and deceitful gaming; that Statute is said to be remedial where the action is brought by the party injured, but penal when brought by a common informer. Even if it be a penal action the proper plea is not guilty and not *nil debet*.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—This was an action of debt for treble value for not setting out tithes, to which there was a plea of *nil debet*. To this plea the plaintiff demurred, and assigned for a special cause, that it was a plea not allowed by the pleading rules. The case was argued late in last term before my brothers Alderson and Gurney, and myself, and we have considered it, and are of opinion that the plea is good.

Two reasons were urged on the argument for the validity of the plea; the first, that the rules did not extend to actions of debt except those on contract; the second, that this plea was given by the Statute 21 Jac. 1, c. 4, and therefore that the judges had no power, by reason of the proviso in sect. 1

(i) 1 Show. 354.
 (j) Vol. 2, p. 1312.

(k) 2 W. Black. 1226.

of 3 & 4 Will. 4, c. 42, to deprive the subject of the benefit of this plea, and of giving the special matter in evidence under it, whatever they may have intended to do by the rules. The Court, on argument, intimated its opinion upon the first point, but took time to consider the second, and look into the authorities. We think, after full consideration, that this is a penal action within the 4th clause of the 21 Jac. 1, c. 4, and consequently, that the judges had no power to deprive the defendant of the right to plead *nil debet* or not guilty.

That section is as follows:—"That if any information, suit, or action, should be brought or exhibited against any person or persons for any offence committed or to be committed against the form of any penal law, either by or on behalf of the king, or by any other, or on the behalf of the king and any other, it shall be lawful for such defendants to plead the general issue, that they are not guilty, or that they owe nothing, and to give such special matter in evidence to the jury that shall try the same, which matter being pleaded, had been a good and sufficient matter in law to have discharged the said defendant or defendants against the said information, suit, or action, and the said matters shall be then as available to him or them to all intents and purposes, as if he or they had sufficiently pleaded, set forth, or alleged the same matter in bar or discharge of such information, suit, or action."

There is no doubt that this case is within the letter of this section taken by itself.

A penal law is a Statute which imposes a penalty, and the Statute of *Edward* 6th does impose a penalty, for it trebles the original duty by way of punishment, thus making the defaulting party liable to a forfeiture beyond the amount of the duty withheld. It is true that it is an action not *barely* penal, for on the principle that it is for a duty also, such action lies by executors within the equity of the Statute *de bonis exportatis in vita testatoris*, *Moreton v. Hopkins* (1). And after a recovery in this action, the plaintiff cannot recover the tithe in any other suit, *Champerton v. Hill* (m); nor is it purely penal, within the rule adopted by the Courts, as to granting new trials after a verdict for the defendant.

The question then is, whether by the context, or any judicial exposition of the words of this section, actions of this kind or any actions for penalties by the party aggrieved, are taken out of the operation of the words according to their ordinary construction.

In the context, nothing is to be found which restricts the ordinary meaning of the words of this clause to any particular class of informations. The title (though it is not strictly a part of the Act, and is therefore of little weight) is *general*, "An Act for the ease of the subject concerning informations upon penal Statutes." The recital in the preamble is, "that offences against penal laws may, with more ease and less charge, be commenced and tried in the counties where they are committed, and that the poor commoners are grievously molested by troublesome persons commonly called relators, informers, and promoters, by compelling them to appear in His Majesty's Courts at *Westminster*." This recital applies only to such informations as might be prosecuted either at the Assizes or Sessions, or in the superior Courts, at the option of the informer; and the first clause removes that particular grievance

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by restricting such informations to the Courts below ; and the third imposes a further check on these informations (namely, such as, "by that Act, are before appointed to be heard and determined in their proper counties") by requiring the relator to make affidavit that the offence was committed in the county, and within the year. The second section is in its term general, but it has received a judicial construction, and been held to apply only to the same description of information as before mentioned. See the case of *Barber v. Tilson* (n), and also Mr. Justice Bayley's observations in *Whitehead v. Wynn* (o) ; its effect is with respect to such informations to re-enact the provisions of the 35 *Eliz.* c. 5, s. 2, with some alteration as to the mode of taking advantage of the objection, and to enforce the laying the venue in the proper county.

These three sections, therefore, remedy the particular mischief recited. Then comes the section in question, which, instead of confining itself in express terms, like the third section immediately preceding, to the informations before appointed to be tried in their proper counties, uses general language. The words introductory of this (the fourth section), instead of "be it further enacted," as in the second and third, are "and be it also enacted," as if proceeding to a new head. It then goes on, "That in any information, action, or suit." (not in any *such* information, &c.) "on any *penal* Statute, it shall be lawful for the defendant to plead the general issue, and give the special matter in evidence." Now this section is not in any mode of construing it, whether, as relating only to suits on penal Statutes as are thereafter to be brought in the inferior Courts, or to all suits on such Statutes, calculated to remove the particular grievance mentioned in the preamble, viz., that the subject has been vexatiously sued in the superior, when he might have been sued in the inferior Courts, and out of the proper county. The section is, in my view of it, an additional boon to the subject ; it goes beyond the grievance recited ; but it is within the general object of the Act, the ease and relief of persons sued. We see, therefore, no reason in the context contained in the recital, for putting a narrow construction on the general words of this clause, and there is no other part of the Act which can have that effect. On the other hand, the proviso (the 5th section), which clearly includes some actions in which the remedy was in the superior Courts alone, affords an argument, we do not say a conclusive one, (for the proviso may have been inserted for the sake of caution), but still it affords some argument that some part of the Statute was intended to apply to other penal Statutes than those in which the remedy was either in the superior or inferior Courts, at the option of the informer ; and if so, the section in question being in its terms general, may well answer that description.

We think, therefore, that there is nothing in the context which limits the general language of the fourth section, and there is not certainly any judicial exposition of this *section* (though of all the other sections there is (p),) which confines it to that class of actions which was capable of being brought either in superior or inferior Courts at the time of the passing of the 21 *Jac.* 1, or to actions by common informers.

(n) 3 M. & Sel. 429.

(o) 5 M. & Sel. 427.

(p) Lord Kenyon in *Leigh v. Kent*,
3 T. R. 364 ; *Rex v. Gaut*, 1 Salk. 372 ;
Hicks's Case, *ibid*, 373.

There is indeed a dictum of Lord *Mansfield's*, in the course of the argument of the case of *Libley v. Cumming* (q), which it is proper to notice. It was an action of debt for bribery on the 2 *Geo.* 2, c. 24, and the question was, whether under *nil debet*, the defendant could prove that he was a discoverer under the Act, so as to be excused from the penalties. In the course of the argument, Mr. *Mansfield* contended that the right to give that evidence did not depend upon the old rules of pleading only, for the Act of 21 *Jas.* 1, c. 24, extended to actions upon subsequent Statutes, which Lord *Mansfield* denied. No decision was, however, ultimately given on that point, for the Court held that the defendant was not a discoverer within the meaning of the Statute, and Lord *Mansfield's* denial may have been directed to the general proposition, that the *whole* of the Statute, 21 *Jac.* 1, applied to subsequent Statutes as well as those in force at the time, which it certainly does not, as it has been frequently held, that every subsequent Statute which imposes a penalty *to be recovered in the superior Courts*, gives a new remedy, to which the Statutes of *James* do not apply, *Hick's Case* (r). We are strongly inclined to think that the fourth section does apply to all subsequent Statutes; probably, it was on this ground that the Court of *King's Bench* intimated their opinion in the case of *Faulkner v. Chevell*, that Not Guilty was a proper plea; but whether the subsequent Statutes be within this clause of the Statute or not, the dictum of Lord *Mansfield*, above referred to, does not bear on this question, whether the fourth section applies to all penal actions, or only to penal actions of a particular description.

It was argued for the plaintiff, that at common law, before the Statute, Not Guilty or *nil debet* were both good pleas to an action of debt for the treble value of tithes, *Langley v. Haynes* (s), *Johns v. Carne* (t), *Wortley v. Herringham*, all prior to the Statute of 21 *Jac.* 1, as unquestionably they were, and therefore, that the right to plead those pleas was *given* by the Statute in the case of this particular action. That is true, but it is equally true of every other penal action, and besides, the Statute does more than give the right to plead such pleas, for it allows the defendant to give in evidence, under those pleas, any matter, which if pleaded, would have been sufficient in law to discharge the defendant from that information or suit; and every such matter might probably not have been given in evidence under the general issue at common law as the law was then understood.

For these reasons, which we have given at some length on account of the importance of the case, we think the plea good; but the plaintiff may, if he pleases, withdraw the demurrer and join issue on payment of costs.

(q) *Burr.* 2467.
(r) 1 *Salk.* 372.

(s) *Moore*, 302.
(t) *Cro. Eliz.* 621.

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DEBT in 1500*l.* for money paid, in 92*l.* for interest, and in 1600*l.* for money found to be due on an account stated. *Plea* as to the first and second counts, that the said sum of 1500*l.*, in the first count mentioned, was and is

A covenant not to sue for a limited period on a simple contract debt, is not

pleadable in bar to an action for such debt.

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the amount of certain monies paid by the plaintiffs for the defendant's use, under and by virtue of a certain bond or obligation mentioned and recited in the deeds hereinafter in this plea mentioned, and that the plaintiff claims the interest in the second count mentioned, and the same accrued after the making of the deed of the 21st *June*, 1831, hereinafter mentioned, upon and for the forbearance of the said monies so paid by him the plaintiff for the defendant's use, under and by virtue of the said bond, and that the plaintiff paid 750*l.*, parcel of the said sum of 1500*l.* at one time, and the residue of the said 1500*l.* at another time, to wit, to *Edward Blithe Vise*, hereinafter mentioned. And the defendant further saith, that after the plaintiff had paid to the defendant's use part of the said monies, to wit 750*l.*, parcel of the said sum of 1500*l.*, and before he had paid for the defendant's use any part of the residue of the said sum of 1500*l.*, to wit, on the 21st day of *June*, 1831, by a certain deed then made, sealed with the respective seals of the plaintiff and defendant, and bearing date on the last mentioned day, after reciting that in consequence of a certain family relationship subsisting between the plaintiff and the defendant, the plaintiff by way of advancing the said defendant in life, did at the special instance and request of the defendant, become bound with him in a certain bond or obligation, bearing date on or about the 1st day of *March*, 1828, unto *Edward Blithe Vise*, in the penal sum of 3000*l.*, with a condition thereunto subscribed for making the same void, on payment of the sum of 1500*l.*, with such interest for the same by such instalments or payments, and at and on such days or times, and in such manner and form as are therein particularly expressed; and further reciting (here the deed recited an indenture of assignment by the defendant to the plaintiff, dated 6th *April*, 1829, of a policy of insurance for 1500*l.* on the defendant's life, subject to a provision for re-payment thereof by the plaintiff, his executors, &c., to the defendant, his executors, &c., or as he or they should direct on payment by the defendant, his heirs, executors, or administrators, of the said principal sum of 1500*l.*, with the interest thereof, pursuant and according to the tenor and effect of the said bond and the condition thereof, and also on the defendant, his heirs, executors, or administrators, saving harmless and keeping indemnified the said plaintiff, his heirs, &c., of, and from all damages, sum and sums of money, costs, charges, and expences whatsoever, which he or they or any of them should or might sustain, or be put unto or be liable to pay by reason or on account of him; (the plaintiff being bound with the defendant for the payment of the sum of money and interest aforesaid), and further reciting, that the plaintiff had lately paid (the said defendant having been unable so to do) to the said *Edward Blythe Vise*, the sum of 750*l.* (being parcel of the said sum of 1500*l.*, in the said first count mentioned) on account, and in part discharge of the money secured to him by the said thereinbefore recited bond or obligation, so that there then only remained due and owing to the said *Edward Blythe Vise*, the principal sum of 750*l.* upon or in respect thereof, and further reciting, that as it would be inconvenient to the defendant to pay the said remaining sum of 750*l.* to the said *Edward Blythe Vise*, at the time fixed upon by them for that purpose, the plaintiff had agreed to pay the same, and to enter into such covenants as are thereinbefore contained, in the consideration of the said relationship existing between the plaintiff and the defendant as aforesaid, and in consideration of the said indenture of assignment, of the 6th day of *April*,

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1829, being made and executed by the defendant to the plaintiff, by way of indemnity or security, as thereinbefore recited, he, the plaintiff, for himself, his heirs, &c., did thereby covenant and agree with and to the defendant, his executors, administrators, and assigns, by the said deed now in recital, in manner following, (that is to say) that he, the plaintiff, his heirs, &c., or some or one of them, should and would when called upon or requested so to do, well and truly pay or cause to be paid unto the said *Edward Blythe Vise*, his executors, &c., the said sum of 750*l.* (being the residue of the said sum of 1500*l.* in the declaration mentioned), and all interest which might be then due for the same in full discharge, and according to the purport and effect of the said thereinbefore recited bond and the condition thereof, and would not ask or require the said defendant to join him or them in such payment, and also that he, the plaintiff, his executors, &c., *should not nor would before the expiration of ten years from the date thereof, and which have not yet elapsed*, if the said defendant should so long live, *call in demand or compel payment of the said sum of 750*l.* already advanced, or of the said sum of 750*l.* residue of the said sum 1500*l.* in the declaration mentioned*, and interest thereon to be advanced by him in manner aforesaid, or for any part thereof, *nor would use or take any ways, means, or proceedings whatsoever, for obtaining the possession or receipt of the same sums or any part thereof*, and further, that he, the plaintiff, his executors, &c., should and would from time to time, and at all times thereafter, during the said term of ten years, if the said defendant should so long live, accept and take any sum or sums on account, and in part payment of the money which he had already advanced or paid, or might thereafter advance or pay to the said *Edward Blythe Vise*, for the use of the said defendant, as aforesaid, by such instalments in such proportions, and at such times as it should or might be convenient for the defendant to pay the same or any part thereof, and that thereupon, he, the plaintiff, his executors, &c., should and would give to the defendant a receipt or receipts, or other proper discharge or discharges for the money, which he or they might from time to time receive from the defendant, under and by virtue of the said deed; and lastly, that so soon as the said defendant should have paid him, the plaintiff, his executors, &c., all money which he or they might have advanced for the use of the said defendant as aforesaid, with lawful interest for the same, he or they would re-assign the said thereinbefore recited policy of insurance to the defendant, or as he might direct, or in case of the death of the defendant before or at the expiration of the said term of ten years, he, the plaintiff, his executors, &c., should and would immediately after that event, take the proper and necessary steps for recovering and receiving the said sum of 1500*l.*, insured upon the life of the defendant, as aforesaid, and assigned to him, the plaintiff, in manner before expressed, and would (after deducting all costs and charges, which he or they might have been thereby put unto, and all principal money which might then remain unpaid by or due and owing from the defendant to him), pay over the residue or surplus of the money to be recovered or received, under or by virtue of the said policy of insurance to the executors, or administrators, or assigns, of the said defendant, or as he or they might direct; and it was and is thereby further declared and agreed, that although the plaintiff had for himself, his heirs, &c., by the said deed covenanted and agreed not to require before the expiration of ten years from the date thereof, the payment of any principal

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sum or sums of money which might, from time to time, be due and owing to him or them from the defendant in manner above mentioned; yet it was not intended that the said covenant should extend to preclude him, the plaintiff, his executors, &c., from demanding or compelling payment of interest for the said advances; and therefore he, the defendant, did thereby for himself, his heirs, &c., covenant, promise, and agree with and to the plaintiff, his executors, &c., that the defendant, his heirs, &c., should and would half yearly, on the 21st day of *June*, and the 21st day of *December*, in every year during the said term of ten years, pay or cause to be paid to the plaintiff, his executors, &c., lawful interest for all such sum and sums of money as might, from time to time, during the said term, be advanced by the plaintiff, his executors, &c., for his use as aforesaid, and also should and would pay all annual sums or premiums necessary for keeping the above mentioned policy of insurance on foot, pursuant to the covenant for that purpose contained in the said recited indenture, of the 6th day of *April*, 1829. Verification.

General demurrer and joinder.

W. H. Watson, in support of the demurrer, was stopped by the Court.

Cresswell, in support of the plea.—The plea shews upon the face of it, the consideration for the agreement not to sue, viz., that the defendant had kept up the policy of insurance; a covenant not to sue at all, operates as a release of the debt, and there seems no valid reason why a covenant not to sue on a simple contract debt for ten years, should not operate as a suspension of the right of the action for that period. The reason why a covenant not to sue, generally operates as a release, is to avoid circuity of action; the damages recoverable by either party, being equal; and so they would be in the present case. It is true that a distinction is taken in the earlier cases between a covenant not to sue at all, and a covenant not to sue for a limited period (*a*).—[*Parke, B.*—It is expressly so ruled by Lord *Holt* in *Ayloff v. Scrimshire* (*b*).]—There is a difficulty, which does not appear to have been adverted to, respecting the case of a surety, who is discharged by giving time to the principal, on the ground that during the time the creditor is precluded from suing the principal debtor, *Davey v. Prendergrass* (*c*), *Lewis v. Jones* (*d*).—[*Parke, B.*—The true reason why the surety is discharged by giving time to the principal is, that it is the duty of the creditor not to tie up his hands against the principal, but to take all due remedies against him, *Ex parte Gifford* (*e*).]—In *Howell v. Jones* (*f*), this Court held, that the taking an acceptance from the principal debtor (to whom the plaintiffs, who were bankers had made advances on the guarantee of the defendant), was held to discharge the surety, although it was not in satisfaction of the original debt, and could not be pleaded as such.—[*Parke, B.*—The books are full of authorities against you (*g*).]

Judgment for the plaintiff

(*a*) 1 Roll. Abr. 939; *Hodges v. Smith*, Cro. Eliz. 623.

(*b*) Carth. 63; 2 Salk. 572.

(*c*) 5 B. & Ald. 187.

(*d*) 4 B. & C. 506; 6 D. & R. 567.

(*e*) 6 Ves. 805.

(*f*) 1 C. M. & R. 97.

(*g*) *Lacy v. Kynaston*, 2 Salk. 575; *Deus v. Jefferies*, Cro. Eliz. 352; *Burgh v. Preston*, 8 T. R. 486; 2 Saund. 47, t.

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ASSUMPSIT. The first count stated that the defendant, as executor, was indebted to the plaintiff for goods sold and delivered to him as executor; *Second*, for work and labour done for the defendant as executor; *Third*, for money paid for the use of the defendant as executor; *Fourth*, for money due from the defendant as executor, upon an account stated, and that the defendant as executor promised to pay. The defendant pleaded *non assumpsit*, and *ne unques* executor.

A verdict having been found for the plaintiff, with general damages, *Channell*, in *Michaelmas Term*, moved to arrest the judgment, on the ground of a misjoinder of counts.

Platt shewed cause.—With respect to the count on the account stated, it is now settled that a defendant may be charged in his representative character, *Rose v. Bowler* (a), *Powell v. Graham* (b), and a count for money paid to the defendant as executor may be joined with it, *Ashby v. Ashby* (c). But then it is objected, that the two first counts necessarily charge the defendant *de bonis propriis*, and therefore cannot be joined with the two latter counts. But *Rogers v. Price* (d), and *Tugwell v. Heyman* (e), are authorities that an executor may be liable, as such, for the expences of a funeral suitable to the degree of the testator. It is clear he may charge the estate with such expences; and if an action be brought by another creditor, he may give in evidence those payments. Unless the contract stated upon the record is impossible, there is no misjoinder. Might not an executor contract that he will not be personally responsible, but that the other party must look to the estate for payment?—[*Alderson*, B.—It is clear, according to the authorities, that an action cannot be brought for money had and received by the defendant as executor. But according to your argument, the defendant might say, I received the money as executor; but that will not alter his liability.] Suppose a case in which he has a right to charge the estate, may he not contract in respect of it, and save himself from liability? Or, if a man contract with another for work to be done, and before it is finished, the party dies; is not his executor liable for it when afterwards completed?—[*Parke*, B.—In that case, the executor would be liable, but then the declaration should state the contract with the testator, that the work was incomplete at the time of his death, and finished afterwards, and that the defendant, as executor, promised to pay.]

Where a defendant was sued as executor for goods sold, for work and labour, for money paid, and on an account stated:—*Held*, that he was not liable in his representative character on the two first counts, and that therefore, there was a misjoinder. *Semble*, that the plaintiff could not have recovered upon the two first counts, supposing the goods, or the work and labour, to have been contracted for by the testator, and the contract to have been completed by the plaintiff, in the time of the executor.

Channell, contrd.—There are two questions arising upon this record; first, whether a defendant can be liable as executor for goods sold, and work and labour; and, secondly, whether the form of pleading is right. *Rogers v. Price* does not affect the present case. There it was decided, that an executor having assets was liable to pay the expences of the funeral to a third party,

(a) 1 H. Black. 109.

(b) 7 Taunt. 580; 1 Moore, 305.

(c) 7 B. & C. 444; 1 Man. & R. 180.

(d) 3 Y. & J. 28.

(e) 3 Camp. 298.

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who had buried the deceased ; but though the law in such a case implies a promise, yet the contract is not with the defendant as executor, but in his personal capacity. *Rogers v. Price* has been disapproved of in *Lucy v. Walrond* (f), and the only way in which it can be supported is, by considering the words "as executor," as surplusage. Here, if those words be struck out of the two first counts, they must stand in the two last, and then there will be upon the record counts, to which the same plea and the same judgment are not applicable. Could the defendant plead *plene administravit* to a count for goods sold ; if not, it is clear he cannot be charged as executor.

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PARKE, B.—A motion was made in this case in arrest of judgment, and was argued in the course of the last Term. The declaration contained four counts in *indebitatus assumpsit* ; the first stating the defendant, as executor, to be indebted to the plaintiff for goods sold and delivered by the plaintiff to the defendant as executor ; the second, for work and labour performed, and materials supplied to the defendant as executor ; the third, for money paid for the use of the defendant as executor ; and the fourth, for money found to be due from the defendant, as executor, to the plaintiff, on an account stated ; and it was alleged, that the defendant, as executor, promised to pay. To this declaration there were two pleas, *non assumpsit* and *ne unques executor* ; and on issue joined, a verdict was found for the plaintiff, with general damages. The objection was, that there was a misjoinder of counts, the last being clearly for a debt due from the defendant in his representative character, *Ashby v. Ashby*. The third count was admitted to be for a debt which might be due from the defendant in that character, for which the same case of *Ashby v. Ashby* is an authority ; and, therefore, that count is not improperly joined with the last. But the first two counts, it was contended, must necessarily be for debts due from the defendant in his own right, as no goods could be sold to, or work performed for another, in his representative character. To that it was answered, first, that goods sold for the purpose of a funeral, and the expences attending it, might be due from the executor, as such ; and the two cases of *Tugwell v. Heyman*, before Lord Ellenborough, and *Rogers v. Price*, in this Court, were cited as authorities ; and, secondly, that if goods were contracted to be sold to the testator, or work agreed to be done for him, and the goods were delivered to, or the work completed for, the executor, such demands might be recovered against the executor in his representative character, under the first two counts.

With respect to the two cases above cited, it was, no doubt, decided by them, that there is an implied promise on the part of an executor who has assets, to pay the reasonable expences of such a funeral of his testator, as is suitable to his degree and circumstances. It was contended, however, at the bar, that those decisions were against a prior authority, and were wrong (a question upon which it is not necessary for us to give any opinion) ; but that if they were right, the only point really determined was, that the law implies a contract on the part of the executor "personally" and not in his representative character ; and we are all of that opinion.

The implied promise cannot place the defendant in a different condition

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than if he had made an express contract to the same effect, which certainly would have bound him personally only; and none of the cases contain any authority to the contrary. In *Rogers v. Price*, the report does not give the form of the declaration; it may have been against the defendant in his own right. In *Tugwell v. Heyman*, it seems to have been against the defendants as executors; but the question, whether the action would lie against them in that character, was not made; and if it had been made, the answer would have been, that if a defendant could not, under any circumstances, be liable for work and labour done for him as executor, those words in the declaration might be struck out as surplusage; which they could not be, in a case in which a defendant could, on any supposition, be liable in that character to the contract declared upon.

In a recent case of *Lucy v. Walrond*, in which the declaration was against the defendant, as administrator, for the expences of a funeral, the point was not discussed; but the case was decided on the ground of the payment of money into Court. We think, therefore, that the first two counts cannot be supported, on the ground that an executor, as such, cannot be made liable for the funeral expences of the testator. Nor do we think that the plaintiff could have recovered under the first two counts; if the goods, or work and labour, had been contracted for by the testator, and the contract completed by the plaintiff in the time of the executor. In one of these counts, the goods are stated to have been sold to the defendant; and in the other, the work and labour performed for him at his request: and neither of these averments would be true. In order to recover upon this supposed state of things, the counts should have been differently framed. We are therefore of opinion, that the two first counts are necessarily for debts due from the defendant in his own right; and, consequently, that there is a misjoinder; and the rule must be made absolute to arrest the judgment.

Rule absolute.

RINGER v. CANN and another.

DEBT for rent on an indenture of demise, by lessor against assignees.

The plea denied the assignment and entry.

At the trial before *Vaughan, J.*, at the *Norfolk Summer Assizes*, it appeared that one *Vince* was lessee of the mill and premises in respect of which the action was brought, and that being in insolvent circumstances, he executed a deed of assignment to the defendants, whereby, after reciting that he was indebted to the several parties named therein, in sums of money, which he was unable to pay, and had agreed with the said persons to transfer,

The lessee of certain premises at a rack rent being insolvent, executed an assignment to defendants, by which, after reciting his insolvency and that he had agreed to as-

sign "all his debts, personal estate, and effects of every description for the benefit of his creditors; he conveyed and assigned to the defendants all and singular the stock in trade, implements, crops of every kind, as well severed as not, and personal estate of every description whatsoever, in, upon, and about the said premises then in his use or occupation, &c. (except the wearing apparel of himself and family, and also all debts, securities, &c. and all other his personal estate and effects whatsoever and wheresoever, habendum in trust out of the proceeds: first to pay the expences of the assignment; secondly, to pay the rent due and in arrear for the premises, or accruing due until and up to the 6th April then next, and thirdly, to distribute the residue for the benefit of the creditors:"—*Held*, that the words of the assignment were sufficiently large to comprehend the lease, and it being the intention of the parties to include all the insolvent's property, and the jury having found that the assignees had accepted the lease, it passed to them under the assignment.

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assign over, and convey all his debts, personal estate, and effects of every description unto the defendants upon trust, for the benefit of the creditors: it was witnessed that the said *Vince* did convey, &c., to the defendant, "all and singular, the stock in trade, implements, and utensils in trade, corn, grain, hay, horses, carts, and carriages, crops of every kind, as well severed as not, household furniture, plate, china, linen, effects and personal estate of every description whatsoever of him, the said *Vince*, in, upon, or about the dwelling-house, mill, out-houses, and premises, situate in *H.*, now in his use or occupation, or elsewhere soever, or which any person or persons now, &c., have or hath in his or their hands, &c., on account of the said *Vince*, (except the wearing apparel of himself and family,) and also all and every the debts, &c., due to the said *Vince*, and also all bonds and other securities for money, books of account, and other papers, and all other the personal estate and effects of him, the said *Vince*, whatsoever and wheresoever, or in or to which he is in any wise interested or entitled, or which any person or persons have or hath in trust for him, (except as aforesaid,) to hold in trust, collect, and dispose of and convert into money the said effects; first, for payment of the expenses of the assignment; secondly, to pay the rent due and in arrear for the said mill and premises, in the use or occupation of the said *J. Vince*, or accruing due, until, and at, and up to the 6th *April* next; and thirdly, for distribution among the creditors." It was proved that the premises were held at a rack rent. On the part of the defendants, it was contended, that the lease did not pass to them under the above mentioned assignment. The learned judge was of opinion, that the terms of the assignment were sufficiently large to comprehend the lease, and left it to the jury to say whether the defendants had elected to take it. The jury having found a verdict for the plaintiff, *Biggs Andrews* obtained a rule to enter a nonsuit, against which

F. Kelly shewed cause.—The question is, whether the terms of the assignment are sufficiently comprehensive to pass the lessees' interest. It may perhaps be contended, that as the stock, &c., on the premises, is expressly conveyed, and no mention is made of the premises themselves, they were meant to be excluded, but the subsequent words, "all other the personal estate and effects of him, the said *J. Vince*," are sufficient to comprehend every species of personal property, to which the insolvent was entitled. The manifest intention of the parties was, that the whole of the insolvent's property should be made available, for the benefit of his creditors. Admitting the doctrine laid down by Lord *Tenterden*, in the case of *Carter v. Warne* (*a*), to be correct, no question can arise here as to the right of the assignees to repudiate this assignment, because the jury have found that they have accepted the lease.

Biggs Andrews and *Byles*, *contrâ*.—Although general words are introduced in the assignment, they are not sufficient to pass particular property, since they must be restrained to words *ejusdem generis*, governed by the context. Here the intention of the parties was to raise money for the benefit of the creditors, and nothing was intended to pass which could not be made available, for the purpose of sale or transfer. Now, this was a lease at a rack rent, and could be of no value to the creditors. The intention to exclude

the mill, may be collected from the language of the assignment. The property is described to be "in and upon the mill," but the mill itself is not mentioned. So also there is a conveyance of the crops of every kind, "as well severed as not," which would be unnecessary if the parties intended to convey the land on which they grew. There is also a provision, that the assignees shall pay rent up to the 6th April next.—[Parke, B.—That was probably inserted as a protection to the assignees against the creditors in making that payment.]—In *Payler v. Homersham* (b), it was held, that the general words of a deed had reference to the particular recital, and were to be governed by it. In *Doe v. Meyrick* (c), it was held that the previous particular enumeration in a deed of certain parts of an estate, restrained the operation of the subsequent general words. The same principle will be found in *Rawlings v. Jennings* (d), and *Roberis v. Kuffin* (e): other authorities will be found in *Com. Dig.* "Act of Parliament," (R. 18.)

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LORD ABINGER, C. B.—I think the distinction in all cases of this kind is, whether or not it was the intention of the parties to pass a limited interest, and if it was, then the rule is not to construe general words, so as to extend that interest. If for instance, the party conveying, has himself only a limited estate in the subject matter, then the general words may be restricted to that which was the manifest intention of the grantor. Here the object of the conveying party was to make a general assignment for the benefit of creditors, and we cannot take into consideration what might be the particular value of this lease. There can be no doubt, that, if this lease was of any value, the object was to pass the whole, and there are words sufficiently comprehensive to include all the property, for the reason already given. I think the stipulation that the assignees should pay rent up to a certain period, does not alter the case.

PARKE, B.—I am of the same opinion. It seems to me, that the learned judge at *Nisi Prius*, was right in saying that the leasehold estate did pass under the assignment. In *Doe v. Meyrick*, the object of the parties was to pass a particular estate only, and the general words used were restricted to meet that intention. But that is not the case here; here the object of the parties is to convey every thing valuable and capable of being turned into cash; that appears from the recital of the deed. The insolvent agrees to assign all his personal estate and effects of every description, upon trust for the benefit of his creditors, and the assignment goes on to enumerate the personal estate; then follow the general words which cannot be restricted, the object of the parties being to pass all the property which might be beneficial to the creditors. Then as to the provisions for the payment of rent, the assignees are to pay the bygone rent as well as that accruing, up to a certain day, and I think the object of it was to enable the assignees to discharge the landlord's claim, whether they took possession of the property or not.

BOLLAND, B.—Looking at the object of the parties, I think it is clear that they intended to pass this property.

Rule discharged.

(b) 4 M. & Sel. 423.
(c) 2 C. & J. 223.

(d) 13 Ves. 39
(e) 2 Atk. 112.

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By deed-poll, dated 21st October, defendant sold to the plaintiff a ship, with its tackle, &c., and covenanted that he had good right, full power, and lawful authority to grant, bargain, sell, assign, and set over the premises:—*Held*, that this was a covenant that the subject matter of the transfer existed in the character of a ship at the date of the deed, and if it was physically destroyed, or had ceased to answer the designation of a ship, the covenant was broken.

The ship in question had got on shore on the coast of *Prince of Wales's Island*, on the 13th October, 1836, and was left by the crew beating on the shore. The crew had access to her afterwards. On the 14th October, the captain had her surveyed, and she was sold on the 24th. The ship had sustained no more damage on the 21st, than when she first struck. It was proved that if there had been facilities, and at a different season of the year, she might have been repaired, and if in England, she might easily have been got off. When on shore she was five feet above water on one side; on the other not so much, and her bulk ends were strained. Upon these facts, the Court were of opinion, that though she might be totally lost within the meaning of a contract of insurance, yet as she still existed as a ship, there was no breach of the covenant.

COVENANT. The declaration stated, that by a certain deed-poll, dated the 21st October, 1836, in consideration of 4200*l.* to the defendant by the plaintiff paid, the defendant did fully, freely, and absolutely, grant, bargain, sell, assign, and set over unto the plaintiff, all that ship or vessel called the *Sarah of Newcastle*, of the burthen of 317 tons, together with all and singular the masts, sails, sail-yards, anchors, cables, ropes, cords, guns, gunpowder, ammunition, small arms, tackle, apparel, boats, oars, and appurtenances whatsoever, to the said ship or vessel in anywise belonging or appertaining, to have and to hold to the said plaintiff, his executors, &c., from thenceforth for ever; and the defendant did therein covenant with the plaintiff, that at the time of the ensealing and delivery of the said deed-poll, the defendant had in himself good right, full power, and lawful authority to grant, bargain, sell, assign, and set over the said premises to the plaintiff in manner and form aforesaid. The declaration then alleged, that before and at the time of making the said deed-poll, the said ship or vessel, with the masts, &c., was wholly lost and destroyed, and was incapable of being granted, bargained, sold, assigned, or set over, whereof the plaintiff, at the time, &c., was wholly ignorant: and the plaintiff further saith, that the defendant had not, at the time of making the said deed-poll and sealing the same, any power to grant, bargain, &c., the said and other the premises to the plaintiff as aforesaid; wherefore the defendant has broken his covenant, and the plaintiff hath not had, nor can he have possession of the said ship, &c., but hath wholly lost the same, and the said sum of 4200*l.*

The defendant pleaded *First*, as to the first breach, that at the time of making the said deed-poll, the said ship or vessel with the masts, &c., was not wholly lost and destroyed, and incapable of being granted, bargained, &c. *Secondly*; as to the second breach, that the defendant had, at the time of making the said deed-poll, full power to grant, bargain, &c., the said ship and other the premises, &c. *Thirdly*; that before the sealing and delivery of the said deed-poll, the said ship, &c., was on the high seas, in the prosecution of a certain voyage, and that true it is that the said ship or vessel, and the said premises before the ensealing, &c. of the said deed-poll was lost on the high seas, and that the plaintiff was ignorant thereof, and the defendant avers, that before and at the time of the ensealing, &c., of the said deed-poll, he the defendant was ignorant of the said loss, and believed that the said ship was safely prosecuting the said voyage, and that at the time of the ensealing, &c., he had in himself good right, and full power, and lawful authority to grant, bargain, &c., the premises, &c. The replication to this plea denied that the defendant had any power to grant, bargain, &c.

The cause was tried before *Patteson, J.*, at the Spring Assizes, for the

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county of *Lancaster*, when it appeared, that at the time the assignment was made, the ship was on a voyage from the *Shannon* to *Cocagne*, and on the 13th *October*, 1838, got aground near *Prince of Wales's Island*, and was left by the crew. On the 24th *October*, the ship was sold, the hull producing only 10*l*. The captain stated, that on the 21st (the date of the deed-poll), she was much in the same condition as when she first struck, that the masts, &c., were standing, one of the decks was five or six feet above the water, the other less; that if there had been facilities, and it had been a different season of the year, she might have been repaired, and that a ship in the same condition on the English coast, could have been got off again. It also appeared that the defendant had applied to the underwriters for the amount of his insurance upon the ship, as for a total loss.

Upon this evidence, the judge left it to the jury to say whether at the time the ship was sold, she was or was not a ship, whether in fact she was any thing more than a mere mass of timber. The jury found that at the time of the sale, she did not exist as a ship, whereupon the learned judge directed a verdict for the plaintiff for 4200*l*., reserving liberty to the defendant to move to enter a nonsuit.

Alexander obtained a rule accordingly, and also for a new trial, on the ground that the verdict was against evidence.

Cresswell and *Wightman* shewed cause.—A party conveying must have not only a right to convey, but also a controlling power over that which he conveys. Suppose a party had abandoned a ship on the high seas, and had then contracted to sell it; or suppose the vessel had been taken by pirates, could he effectually dispose of it? He might sell the chance of recovering it back, but no more. In *Chamberlain v. Ewer* (a), the effect of a covenant for title is considered, in a case where the covenantor had not the estate which he professed to have. The principle established in that case is confirmed by *Nash v. Aston* (b). There two husbands and their wives joined in a grant of lands of their wives who were parceners, and covenanted that they had right to convey. The breach assigned was, that one of the wives was then an infant, and it was adjudged a good breach. There is a well known distinction between a covenant against acts done before, and a covenant against acts done after the conveyance. The former applies to wrongful and rightful acts equally; the latter, to wrongful acts only. Cases may be put of a thing in *esse*, but yet not in such a condition as to be the subject of a conveyance; as, for instance, a ring at the bottom of the sea, or in a coal-pit, where it cannot be recovered. Here it is clear that the vessel was lost at the date of the contract.

R. Alexander and *W. H. Watson*, *contrd.*—Cases of the kind referred to on the other side are collected in *Sugden's Vend. and Pur.* (c), and amongst others he cites *Hitchcock v. Giddings* (d). There a person sold a remainder expectant upon an estate tail; and both parties considered that the remainder was unbarred; and it afterwards appeared, that a recovery had been suffered

(a) 2 Bulst. 11.

(b) Sir T. Jones, 195; Skinner 42.

(c) 9th ed. 254.

(d) 4 Price, 135.

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before the contract, in that case the purchaser was relieved against a bond which he had given for the purchase money, and the seller was compelled to repay the interest which he had received. The learned editor observes, "This was a strong decision. The purchaser might have ascertained the fact by search. The Chief Baron laid down some very general propositions; his lordship said, that if a person sells an estate, having no interest in it at the time, and takes a bond for securing the payment of the purchase money, that is certainly a fraud, although both parties should be ignorant of it at the time. Suppose I sell an estate innocently, which at the time is actually swept away by a flood, without my knowledge of the fact, am I to be allowed to receive 5000*l.* and interest, because the conveyance is executed, and a bond given for that sum as the purchase money, when in point of fact I had not an inch of land so sold to sell? Both these cases, when they arise, will, it is apprehended, deserve great consideration, before they are decided in the purchaser's favour." And then he adds, in a note that Lord *Eldon*, in a late case, expressed considerable doubt upon such doctrine. *Paine v. Meller* (*e*) was the case of a contract for the sale of houses, which from defects in the title, could not be completed on the day. The treaty however proceeded upon a proposal to waive the objections upon certain terms. The houses being burnt before a conveyance, it was decided, that the purchaser was bound, if he accepted the title, and the circumstance that the vendor suffered the insurance to expire at the day on which the contract was originally to have been completed, without notice, made no difference. So where *A.* agreed on behalf of *B.* to purchase four houses in *Jamaica*, and to pay 800*l.* for the same. The houses were soon after swallowed up by an earthquake, and *A.* had no assets of *B.*, yet the purchase money was decreed to be paid, *Cass v. Rudele and another* (*f*). This decision was afterwards affirmed, upon an appeal to the House of Lords. In *Watkins v. De Lancy* (*g*) the defendant had covenanted that he was lawfully seized of a good estate of inheritance in law, in fee simple, in certain premises conveyed to the plaintiff, and it appeared that before the conveyance, the premises (which were in *America*) had been confiscated by an Act of the state of *New York*; yet this was held to be no breach of the covenant. In *Earl of March v. Pigot* (*h*), a wager was laid upon the chance of survivorship of one of two persons who was dead at the time; yet that did not prevent the winner from recovering. A contract made at a distance, must be taken with all its contingencies. The rules as to insurance do not apply: insurance is a contract of indemnity, which this is not; neither are the cases as to defective title, applicable. The question here is, whether any thing passed under this conveyance. It is clear, that whatever existed of the vessel at the time, did pass; and not only the vessel, but all its earnings. Then the defendant's covenant is only a covenant for title in the subject matter, whatever it might happen to be. The term "set over," does not mean a delivery, but a transfer. But assuming this to be a total loss, for the purposes of insurance, yet it would not be so within the Registry Acts, unless the identity of the vessel were totally destroyed. Capture is a total loss; but not so within the meaning of a bottomry bond, *Park on Insurance* (*i*).—[*Parke, B.*—Though something may pass that will

(*e*) 6 Ves. 349.

(*f*) 2 Vern. 280.

(*g*) 4 Doug. 354.

(*h*) 5 Burr. 2802. But see the observation of *Heath, J.*, upon this case in *Hussey v. Crickett*, 3 Campb. 172.

(*i*) p. 628.

not conclude the matter, for the covenant is to convey something which then existed as a ship.] While a vessel exists in specie, however maimed and damaged, she cannot be considered as a wreck, so as to entitle the assured to claim for a total loss, *Bell v. Nixon* (j).

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Cur. adv. vult.

PARKE, B.—This cause was tried before my brother *Patteson*, at the last *Liverpool* Spring Assizes, when a verdict was found for the plaintiff. The declaration was in covenant on a deed-poll, dated the 21st of *October*, 1836, by which the defendant, in consideration of 4200*l.*, granted, bargained, sold, assigned, and set over to the plaintiff, sixty-four sixty-fourths of the ship *Sarah*, with her masts, tackle, and appurtenances; and the defendant thereby covenanted, that at the time of the sealing and delivery of the deed, he had in himself good right, full power, and lawful authority, to grant, bargain, sell, assign, and set over, the premises to the plaintiff, in manner and form aforesaid; and the declaration states, that the vessel was then lost and destroyed, and incapable of being transferred, whereof the plaintiff was then ignorant: and further, that the defendant had not, at the time of the making of the deed-poll, any power to grant, bargain, sell, assign, or set over the ship as aforesaid.

To this declaration, the defendant, treating these two allegations as separate breaches, pleaded, *First*, that the vessel was not wholly lost and destroyed, and incapable of being transferred; *Secondly*, that he had full power, at the time of the making of the deed, to grant, bargain, sell, assign, and set over; and, *Thirdly*, a similar plea, with a special inducement, stating the loss of the vessel at the time of the execution of the deed, and the defendant's ignorance of it.

The facts of the case, as they appeared on the trial, were these:—the ship, which was on a distant voyage when the assignment was made, had got on shore, on the coast of *Prince of Wales's Island*, on the 12th of *October*, 1836, and was left by the crew, beating on the shore. The crew had access to her afterwards. On the 14th of *October*, the captain had her surveyed, and she was sold on the 24th. The ship had sustained no more damage on the 21st than when she first struck. It was proved, that if there had been facilities, and at a different season of the year, she might have been repaired, and if in *England*, she might easily have been got off. When on shore, she was five feet above water on one side, on the other not so much; and her bulk-heads were strained. On this evidence, the learned judge left it to the jury to say, whether “she was a ship or not on the 21st of *October*,” and they found that she was not. Whereupon, he directed a verdict for the plaintiff, with 4200*l.* damages, reserving liberty to the defendant to move to enter a non-suit. A rule was obtained for that purpose in the following term; and on shewing cause, the case was very fully discussed, and the Court postponed its judgment. We have now considered the case, and are of opinion, that upon the finding of the jury, the plaintiff is entitled to recover; but we think that, upon the facts stated, and on the report, the finding was wrong, and that there ought to be a new trial.

The deed, upon which the action is brought, purports to be an absolute transfer, at the time of its execution, of a specified ship, with all the tackle

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then belonging to it; and by the operation of that deed, all the interest which the vendor had at the time in that vessel or its tackle, in whatever state they were, passed to the vendee from the moment of the execution of the deed; the execution of the deed itself, without any delivery of the chattel, transferring the property. The question, however, is, not what passed by the deed, but what is the meaning of the covenant contained in it, and whether there had been a breach of that covenant, as alleged in the pleadings.

In the bargain and sale of an existing chattel, by which the property passes, the law does not (in the absence of fraud) imply any warranty of the good quality or condition of the chattel so sold, *Parkinson v. Lee* (k), Kielw. 91, Roll. Abr. "Action sur Case" (P.), pl. 4, p. 90. The simple bargain and sale, therefore, of a ship, does not imply any contract that it is then seaworthy, or in a serviceable condition; and the express covenant that the defendant had full power to bargain and sell in the manner before-mentioned, does not create any further obligation in this respect. But the bargain and sale of a chattel, as being of a particular description, does imply a contract that the article sold is of that description, for which the cases of *Bridge v. Wain* (l), and *Shepherd v. Kain* (m), and other cases, are authorities; and therefore, the sale, in this case of a ship, implies a contract that the subject of the transfer did exist in the character of a ship, and the express covenant that the defendant had power to make the bargain and sale of the subject before-mentioned, must operate as an express covenant to the same effect; that covenant, therefore, was broken, if the subject of the transfer had been, at the time of the covenant, physically destroyed, or had ceased to answer the designation of a ship; but if it still bore that character, there was no breach of the covenant in question, although the ship was damaged, unseaworthy, or incapable of being beneficially employed.

The contract is for the state of the subject *absolutely*, and not with reference to collateral circumstances. If it were not so, it might happen that the same identical thing, in the same state of structure, might be a ship in one place and not in another, according to the local circumstances and conveniences of the place where she might happen to be. If the contracting parties intend to provide for any particular state or condition of the vessel, they should introduce an express stipulation to that effect.

This being the view, which, after much consideration, we have taken of the law of this case, it follows, that after the facts found by the jury, the second issue, at least, must be decided in favour of the plaintiff; for if she was not a ship at the time of the execution of the deed, she was incapable of being transferred as such, and therefore the defendant had no power to make the transfer.

The question, whether the subject of the transfer bear the character of a ship or not, may, in some extreme cases suggested in the course of the argument, be a question of great nicety and difficulty. In the present case, we do not think such a difficulty arises. We are of opinion, that upon the evidence given on the trial, the ship did continue to be capable of being transferred as such, at the time of the conveyance, though she might be totally lost within the meaning of a contract of insurance, *Thompson v*

(k) 2 East, 314.
(l) 1 Stark. N. P. C. 504.

(m) 5 B. & Ald. 240.

The Royal Exchange Assurance Company (n), which proceeds upon a different principle, and may take place with less of damage to the ship itself, than occurred in this case. It proceeds upon the loss of the subject insured for beneficial purposes. Here, the subject of the transfer had the form and structure of a ship, although on shore, with the possibility, though not the probability, of being got off. She was still a ship, though at the time, from the want of local conveniences and facilities, incapable of being beneficially employed as such. The covenant, therefore, of the defendant, that he had power to transfer her as a ship, at the time of executing the deed, was not broken.

We think that there must be a new trial; and I must add, that every member of the Court concurs in this judgment.

Rule absolute.

(n) 1 M. & Sel. 30.

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DURHAM and SUNDERLAND RAILWAY COMPANY.**

EJECTMENT to recover an undivided sixth part of certain messuages, land, and premises, situate in the parish of *Sunderland*, in the county of *Durham*. At the trial, before *Coltman, J.*, at the last *Durham* Assizes, it appeared, that the lessor of the plaintiff was tenant in common of the premises in question, with the three first named defendants, who in the year 1834, had granted a lease of the premises for ninety-nine years to the *Durham and Sunderland Railway Company*. This lease was granted against the consent of the lessor of the plaintiff, who gave the Company notice that he was entitled to one-sixth of the property. The Company had proceeded to pull down some houses, and construct a railroad upon their site. The usual special rule had been obtained, admitting the landlords to defend, which was in the following terms: "Upon the motion of counsel for *F. Horn, B. Kennicott, and G. Barras*, landlords of the *Durham and Sunderland Railway Company*, the tenants in possession of the premises in question; and it is ordered, that the defendants admit the tenancy in common of the plaintiff's lessor, with the defendants, *F. Horn, B. Kennicott, and G. Barras*; and that the said *F. Horn, B. Kennicott, and G. Barras*, shall be joined and made defendants with the said tenants if they shall appear; and if the said tenants shall not appear, then that they may be at liberty to appear by themselves; and the said *F. Horn, B. Kennicott, and G. Barras*, consenting in such case, to enter into a rule to confess lease, entry, and also ouster of the nominal plaintiff, in case an actual ouster of the plaintiff's lessor, or the tenants in possession shall be proved at the trial, but not otherwise." The evidence of actual ouster, was the pulling down of the houses and the construction of a railway upon their site. It also appeared, that previously to the occupation of the premises by the Company, certain persons using the style of *Horn and Co.* had occupied them under the tenants in common, and there was evidence

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In ejectment, the lessor of the plaintiff was tenant in common with three of the defendants, who defended as landlords, and there were other defendants, (a railway company), who defended as their tenants. The usual special rule had been obtained for admitting the landlords to defend, and to admit ouster, in case actual ouster should be proved. At the trial, it appeared that rent had been formerly paid to all the tenants in common, by certain other persons, but there was no evidence that such tenancy had been determined:—*Held*, that those who defended as tenants, were not precluded by

the landlord's rule from contending that the legal estate was not in the lessor of the plaintiff, as the former tenancy might still exist. The premises in question were pulled down by the Railway Company, and a railway erected on their site. *Semle*, that this amounted to an actual ouster.

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of payment of rent by *Horn* and Co., to all the co-tenants. It was objected on the part of the defendants; *First*, that no actual ouster had been proved; and *Secondly*, that the lessor of the plaintiff could not recover, because a tenancy having been shewn in *Horn* and Co., no proof had been adduced that it had ever been determined. The learned judge, however, refused to nonsuit the plaintiff, and a verdict was found for him, subject to the opinion of the Court upon the above points.

Alexander having obtained a rule to enter a nonsuit,

Wightman shewed cause.—After having entered into the consent rule, it is not competent for the defendants to set up as a defence, the alleged tenancy of *Horn* and Co. The rule expressly states, that three of the defendants defend *as landlords*, and the *Railway Company as tenants in possession*. In *Doe, d. Davies v. Creed (a)*, it was held, that where a party defended as landlord, the occupiers of the premises having suffered judgment by default, he could not object that the occupiers had not received notice to quit from the lessor of the plaintiff. In that case, the only parties defending were landlords; but this case is stronger, since some defend as landlords, and others as tenants in possession to those landlords. Mere evidence of a payment of rent by parties at some prior time, does not make it necessary to shew any notice to quit, unless they come in and defend either as landlord or tenant. If *Horn* and Co. had come in and defended, a right to recover as against them must also have been shewn.—[*Parke, B.*—There was at some time a demise to *Horn* and Co., as payment of rent to all the co-tenants was proved. They may all have taken a wrongful possession as against *Horn* and Co. If there had been no landlords defending, could not the *Railway Company* have made this objection?]
 Suppose there had been a demise to *Horn* and Co., which had been determined, and the three defendants (the tenants in common) had demised wrongfully to the *Railway Company*, can it be said that the lessor of the plaintiff, in an ejectment against some as landlords, and others as tenants, is bound to prove a notice to quit of the tenancy which had been determined. The evidence shews that *Horn* and Co. were once tenants of these premises to the persons who now defend as landlords; but by the rule, it appears that the *Railway Company* are now tenants in possession to the same landlords of the same premises; so that as against these defendants, there is an admission that the tenancy of *Horn* and Co. does not exist.—[*Parke, B.*—The defendants say the legal estate is not in the lessor of the plaintiff, and in order to shew that, they prove that *Horn* and Co. were in possession as tenants to them.]—The defendants are estopped by the rule, from saying that other persons are not tenants. *Roe, d. Blair v. Street (b)*.

Secondly, an actual ouster was proved by the pulling down of the houses, and erecting a railway on their site. The case is not of frequent occurrence, but it is analogous to cases in which there has been an actual destruction of the property by one of several tenants in common; in which case, trover or trespass may be maintained, *Fennings v. Lord Granville (c)*, *Brummel v. Jones (d)*, *Heath v. Hubbard (e)*. The only question is, whether any sub-

(a) 5 Bing. 327; 2 Mo. & Pa. 648.

(b) 2 Adol. & E. 329; 4 Nev. & M.

(c) 1 Taunt. 241.

(d) 2 Sel. N. P. 1376.

(e) 4 East, 110.

stantial difference arises from the circumstance of this being real, and not personal property. The lessor of the plaintiff can no longer enjoy his undivided sixth part in these houses. An actual ouster is not merely the turning a person out by force, but depriving him of the *usufruct*. Suppose the case of a ship, which three out of four tenants in common had actually destroyed, the fourth might maintain trover, although the materials remained. So here, the plaintiff may maintain ejectment, for although the soil remains, he is deprived of his *usufruct*., by the destruction of the houses.

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Alexander and W. H. Watson, contrd.—A tenancy having been proved to have existed between *Horn* and Co. and the co-tenants, the lessor of the plaintiff cannot recover, without shewing that such tenancy has been determined. The landlord's rule does not shew any determination of the tenancy, nor is it an estoppel as against the *Railway Company*. It was not the common consent rule, but only a landlord's order, which contains nothing more than an admission that a tenancy in common existed between the lessor of the plaintiff and the three first named defendants; and that the Company were tenants in possession, but they do not admit themselves to be tenants to any particular individuals. Under ordinary circumstances, it is clear that *Horn* and Co. would be entitled to a notice; and there is nothing in the terms of the landlord's rule which render it unnecessary to prove such notice. All that the rule admits is, that the *Sunderland Company* were the occupiers, and for anything that appears, they might, consistently with the rule, be tenants to *Horn* and Co. If the Company had been the only defendants, there is no doubt that they might have set up as a defence, that the tenancy of *Horn* and Co. had not been determined.

Secondly, no actual ouster has been proved; though what was shewn to have taken place, might amount to waste. There was no alteration of title or disclaimer. An ouster means a turning out of possession, not a mere injury to the property. The authorities cited on the other side, were cases of a total destruction of the matter itself. In *Co. Litt.* 199 b., it is said: "Albeit, one tenant in common take the whole profits, the other hath no remedy in law against him, for the taking of the whole profits is no ejectment; but if he drive out of the land any of the cattle of the other tenant in common, or doth not suffer him to enter or occupy the land, this is an ejectment or expulsion, whereupon he may have an *ejectione firmæ* for the one moiety, and recover damages for the entry, but not for the *mesne* profits." In *Reading's Case* (f), it is said, "One tenant in common may disseise the other, but it must be by actual disseission, as turning him out, hindering him to enter, &c." But a bare perception of the profits is not enough. The same principle will be found in *Doe, d. Hellings v. Bird* (g).

Cur. adv. vult.

The judgment of the Court was afterwards delivered by

PARKE, B.—This was an ejectment, brought to recover an undivided sixth of certain land, on which two dwelling-houses had stood, but which had been pulled down, and were occupied by the *Sunderland Railway Company*, who had constructed their railway on the site of the demolished buildings. The

(f) 5alk. 392.

(g) 11 East, 50.

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lessor of the plaintiff was tenant in common with three of the defendants, who defended as landlords, and the *Railway Company* were also defendants. It appeared on the trial, that rent had been paid by certain other persons, named *Horn* and Co. for the premises, to all the tenants in common: this was *prima facie* evidence of a tenancy from year to year, and no evidence to the contrary was given. The usual special rule was obtained for the tenants in common to admit ouster, in case actual ouster should be proved; and the evidence of actual ouster was the pulling down of the dwelling-houses, and the construction of the railway on their site. Upon these facts, two points arose, and were reserved by my brother *Collman*:—*First*, whether the want of a proper determination of *Horn* and Co.'s tenancy, could be insisted upon by the defendants in this action. *Secondly*, whether there was any actual ouster of the plaintiff by the defendants, who were tenants in common. We think, that the first of these points is against the plaintiff. If the tenancy of *Horn* and Co. continued to the day of the demise, they would have been the proper lessors of the plaintiff; and it must be taken that it did continue, because there was no proof of its determination by notice to quit or disclaimer. But it is said, that the landlord's rule precluded the defendants, the tenants in common, from raising that question. The case of *Doe*, dem. *Davies* v. *Creed* was cited as an authority. In that case, the tenants, to whom notice to quit ought to have been given, were tenants in possession, and did not defend the action. But the *Railway Company* are not the tenants entitled to notice, and they defend the action; and as they have only entered into the common rule to confess lease, entry, and ouster, and their own possession and no more, they are not precluded, whether the other defendants are or are not, from setting up any defence which they may have; and the want of the legal title in the lessor of the plaintiff to the possession on the day of the demise, is a good defence. This makes it unnecessary to determine the other point; on which, however, it is not improbable that the lessor of the plaintiff would have succeeded, not perhaps on the ground of the destruction of the houses, but from the nature of the occupation by a *Railway Company*, when the railway is complete, and open to the public. *Littleton*, section 322, says, "that if one tenant in common occupy the whole, and put the other out of possession and occupation, he who is put out of occupation shall have against the other a writ of *ejectione firma* of the moiety;" and Lord *Coke* says, in his Commentary thereon, "if he drive out of the land any of the cattle of the other tenant in common, or not suffer him to enter or occupy the land, this is an ejectment or expulsion, wherefore he may have an ejectment for the moiety;" and if the peculiar use which the other tenants in common have, through the *Railway Company*, (who must be taken to have acted with their authority, and to claim under them,) be such as necessarily to exclude the co-tenant from occupying the land, it seems that it would be as effectual an exclusion, as if he had been prevented from entering and occupying by the defendants in person. The rule, however, must be absolute, to enter a nonsuit on the first point.

Rule absolute.

DOE, dem. MURRELL v. MILWARD and another.

Exchequer.

EJECTMENT to recover possession of a house and premises, situate at *Horsham, in Sussex*. The demise was laid on the 27th *June, 1837*. At the trial before *Littledale, J.*, at the last *Sussex Summer Assizes*, it appeared that the defendants were yearly tenants to the lessor of the plaintiff of the house and premises in question, and being desirous of quitting them, they gave the lessor of the plaintiff a notice to quit, which was as follows:—

“*Horsham, 23 December, 1836.*

“We hereby give you notice, that we intend to give and deliver up the possession of the messuage or tenement we now hold of you, at *Midsummer* day next.

“*William Milward.*

“*Robert Milward.*”

“*To Henry Murrell, Horsham.*”

The lessor of the plaintiff made no objection to this notice. The defendants having afterwards discovered that their tenancy commenced at *Christmas* instead of *Midsummer*, and being desirous of continuing in the occupation of the premises, previously to *Midsummer* gave a fresh notice to quit at the *Christmas* following. The lessor of the plaintiff having demanded possession at the expiration of the first notice, the defendants refused to deliver it up, on the grounds that their tenancy did not expire until *Christmas*, and this ejectment was accordingly brought. It was contended on the part of the lessor of the plaintiff, that although the notice might not be sufficient in case the tenancy expired at *Christmas*, yet it would operate as a surrender by operation of law of the defendant's interest, it being a note in writing within the meaning of the third section of the Statute of Frauds. The learned judge left it to the jury to say whether the tenancy commenced at *Midsummer* or at *Christmas*, and the jury found the latter. A verdict was however, entered for the lessor of the plaintiff, on the question as to the surrender, with leave for the defendants to move to enter a nonsuit.

A yearly tenant, believing that his tenancy expires at *Midsummer* gave his landlord a written notice of his intention to quit at that time. The tenant having afterwards discovered that his tenancy did not expire until *Christmas*, gave a fresh notice for that period, and on possession being demanded at *Midsummer*, refused to quit:—*Held*, that the tenancy was not determined by the first notice, and that it could not operate as a surrender within the Statute of Frauds, it being to take effect in future.

Tyndale, in *Michaelmas Term* last, obtained a rule accordingly, citing *Johnstone v. Huddlestons (a)*.

Thesiger and *Ogle*, shewed cause.—This case is distinguishable from *Johnstone v. Huddlestons*, for there the notice was by parol, but here the notice being in writing, though it may not be good as a notice to quit, yet it will operate as a surrender of the defendants' interest in the premises. In *Aldenburg v. Peaple (b)*, *Parke, B.*, said, “The landlord might if he had chosen, have treated this irregular notice to quit as a surrender, as a term of this kind may be surrendered by a note in writing, but he has not done so.” —[*Parke, B.*—That case is in effect overruled by *Weddall v. Capes (c)*.] —No particular form of words is necessary to constitute a surrender; all

(a) 4 B. & C. 922; 7 D. & R. 411.

(c) 1 M. & W. 50.

(b) 6 C. & P. 212.

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that the Statute requires is, that an intention to surrender should be expressed in writing, *Farmer v. Rogers* (d). Here the words are, "We hereby give you notice, that we intend to give and deliver up possession of the messuage or tenement we now hold of you, at *Midsummer* day next."—[*Parke, B.*—The difficulty is, that it is *in futuro*.]—It did not require the landlord's assent at the time, but it was a proposal which he must be taken to have assented to, up to *Midsummer* day, and then it took effect as a surrender.—[*Alderson, B.*—There is an offer by the tenant to do a thing at a certain day, and when the time comes, he changes his mind, and refuses to do so.]—In *Doe, d. Eyre v. Lambly* (e), the tenant on being applied to, respecting the commencement of his holding, informed the party that it began on a certain day, and notice to quit on that day was given at a subsequent time; it was held that he was bound by the information which he had so given, and was not permitted to shew that in fact the tenancy commenced at a different time. The present case is much stronger than that, because here, there was written notice.—[*Alderson, B.*—In the case cited, Mr. *Garrow* asked Lord *Kenyon* to give an opinion as to what ought to be done. It was rather a statement of facts on one side, and assented to on the other.]—At all events, there ought to be a new trial, and not a nonsuit, as the point was not distinctly put to the jury.

Andrews, Serjt., and Tyndale, contra.—There is no authority to shew that a defective notice to quit will operate as a surrender, *Johnstone v. Huddleston*, is an authority to the contrary. There the tenant gave his landlord less than six months' notice, before the tenancy expired, and the premises were re-let by auction, at which the tenant attended, and bid, but the new tenant was not let into possession; and it was held, that the tenancy was not determined, there not having been either a sufficient notice to quit or a surrender by operation of law, within the meaning of the Statute of Frauds. Here there was no assent to the notice on the part of the landlord, until *Midsummer* day, and then the tenant dissented from it. Before that time, it could not operate as a surrender, it being *in futuro*, *Weddall v. Capes*.

PARKE, B.—The rule must be absolute to enter a nonsuit. I am strongly of opinion, that there cannot be a surrender to operate *in futuro*. The case of *Johnstone v. Huddleston*, appears to be decisive on that point. There the Court held, that an insufficient notice to quit, accepted by the landlord, did not amount to a surrender; and it was agreed, that there could not be a surrender to operate *in futuro*. Though the precise point was not determined in *Weddall v. Capes*, yet the opinion expressed by the Court, must be considered as having considerably shaken the authority of *Aldenburgh v. Peaple*. As to granting a new trial, there appears to have been conflicting evidence, as to the time at which the tenancy commenced; but that the jury have determined in favour of the defendant.

ALDERSON, B.—There was evidence to shew that the tenancy commenced at *Christmas*, and the jury have so found; we cannot therefore grant a new trial. The lessor of the plaintiff can, if he is so advised, bring a fresh ejectment.

Rule absolute to enter a nonsuit.

(d) 2 Wils. 26.

(e) 2 Esp. 635.

M'GREGOR and another v. HORSFALL.

Eschoquer.

M'GREGOR and another v. SMITH.

THESE were two actions brought by the same plaintiffs on two different policies of insurance, effected with two different companies upon the same ship, against the defendants, as chairmen of those companies. After the declaration had been delivered, a summons to consolidate the action was served on the plaintiffs, and *Parke, B.*, after hearing the parties at chambers, made the following order, "I do order, that upon submission of the plaintiffs and the last named defendant, to be bound and concluded by such verdict as shall be found in the first-mentioned action (provided the same shall be to the satisfaction of the judge before whom the same shall be tried,) the defendant in the first-mentioned action admitting his subscription to the policy in question, by his authorized agents, named in the declaration, all further proceedings in the last-mentioned action be stayed."

Where two actions were brought by the same plaintiffs against different defendants, on different policies of insurance on the same ship, the Court refused to consolidate them without the consent of the plaintiffs.

Creswell having obtained a rule nisi to rescind or amend this order,

Wightman, shewed cause.—The plaintiffs state no grounds for wishing to try one action rather than the other, but merely object to being bound by the one fixed upon. *Doyle v. Anderson* (a), may perhaps be cited as an authority that the Court will not in such a case, without the plaintiff's consent, make a consolidation rule upon the terms of the plaintiff and defendant being bound in both actions by the event of one; but that case must be considered as overruled by *Hollingsworth v. Brodrick* (b).—[*Parke, B.*—Have you any precedent for binding the plaintiff against his consent?]*—Hollingsworth v. Brodrick* appears to be an authority on that point.

Creswell, contrd.—The plaintiffs claim the right which they undeniably possess, of trying which action they please. This is not the case of two actions on the same policy, but of two different policies effected with different companies. In *Doyle v. Anderson*, the Court decided that they could not bind the plaintiff without his consent. *Hollingsworth v. Brodrick*, cannot be said to have shaken that decision. The plaintiffs are willing to consent to the consolidation rule upon the following terms:—the plaintiffs to select which action they will try, the defendants in the action which is not tried agreeing to be bound by the verdict in the other; the defendant's interest in the policy to be admitted, and if the defendant in the action which is to be tried, pays money into Court, money is also to be paid into Court in the other action.

PARKE, B.—We think the plaintiffs cannot be bound in the way proposed by this order, and unless the terms that are offered are agreed to in a week, the rule for rescinding the order must be absolute.

Rule accordingly.

(a) 1 Adol. & E. 635; 4 Nev. & M. 873.

(b) 4 Adol. & E. 648.

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BOND and another (Assignees of GEORGE POWELL WATTS, a Bankrupt,) and PHILIP HENRY WATTS v. PITTARD.

A. and B. entered into partnership as attornies, and it was agreed that B. should receive 300*l.* a year out of the profits, but he was not to be liable in any manner for the losses of the business, and was to have a lien on the profits for any losses he might sustain by reason of his liability as a partner:—
Held, that A. and B. were properly joined as plaintiffs in an action for work and labour.

DEBT for work and labour as the attornies and solicitors of the defendant, and for money paid, and money due on an account stated. *Plea, nunquam indebitatus.*

At the trial before *Patteson, J.*, at the last Assizes for the county of *Somerset*, it appeared that in the year 1826, the two *Watts*' had agreed to enter into partnership, and that the defendant had retained them both as his solicitors, and had treated them as partners. On the part of the defendant, an answer by *Philip Henry Watts*, to a bill in equity filed by the defendant in this action, was given in evidence, in which it was stated, that in the month of *February*, 1826, he and his brother *George Powell Watts* in the said bill mentioned, who was then carrying on the business of a solicitor and attorney in the city of *Bath*, verbally agreed to enter into partnership together as solicitors and attornies, and that such business should be carried on by them, under the style or firm of Messrs. *George Powell* and *Philip Henry Watts*; and it was further agreed between them that the profits of their said business should be divided between them, in manner following, viz. that he *P. H. Watts* should in each and every year be entitled to receive in the first place out of such profits the sum of 300*l.*, which sum was then represented by the said *G. P. Watts*, to be equal to one-fifth of the profits of the said business so carried on by the said *G. P. Watts*; and accordingly, this defendant, *P. H. Watts*, saith, that the said *G. P. Watts*, and he the said *P. H. Watts* commenced carrying on such business in partnership together under the style and firm aforesaid, and always held themselves out to the world, and were treated by their clients as being, as they were in fact, co-partners in such business; that the said *P. H. Watts* was always treated by the said *G. P. Watts*, as, and was in fact, a partner with him in such business, receiving and paying the debts of such business equally with the said *G. P. Watts*, and entitled to such share in the profits thereof as hereinbefore mentioned; but this defendant *P. H. Watts* admits it to be true, that as between themselves this defendant was not to be in any manner liable to the losses of the said business, inasmuch as this defendant was entitled to retain in the first place, and in all events his share out of the profits thereof, and it was agreed that this defendant should have a lien upon the said profits, for any losses he might sustain by reason of his liability as a partner. The learned judge told the jury, that in order to constitute a partnership, there must be a community of profit and loss. The jury found that *P. H. Watts* was interested in the profit, but not in the loss, and a verdict was entered for the defendant, with liberty for the plaintiffs to move to enter a verdict for them. *Erle* having in *Michaelmas* Term obtained a rule accordingly.

Crowder, (with whom was *Barstow*) now shewed cause.—The rule is, that to constitute a complete partnership, there must be community of profit and loss. *Waugh v. Carver* (a), *Grace v. Smith* (b), *Smith v. Watson* (c).

(a) 2 H. Blac. 235.
 (b) 2 W. Blac. 1000.

(c) 2 B. & C. 401; 3 D. & R. 751.

A community of profits might make them answerable to third parties, but as between themselves there must be a community of loss as well as profit, otherwise they cannot sue jointly, *Green v. Beesly* (d).—[Lord Abinger, C. B.—There is no doubt a participation in the profits would entitle a party to an account in equity. *Parke, B.*—To whom would this money have belonged if recovered? It would belong to both until the end of the year, when an account would be taken, and then 300*l.* would be paid to *P. H. Watts*, and the balance to the other.]—It is submitted that *P. H. Watts* stood in the mere situation of a clerk, with 300*l.* a year salary, and a lien on the profits to that amount.—[*Parke, B.*—Until the net profits are ascertained, the money would be the property of both.]

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LORD ABINGER, C. B.—It is clear that *P. H. Watts* would not be entitled to the 300*l.* a year, unless there were profits, and the lien upon the profits would seem to exclude any other remedy in respect of it. Is he not then in some degree subject to loss? But if not I think he is a partner, so far at least as relates to the money recoverable in this action.

PARKE, B.—There is no doubt this contract was entered into by both the Messrs. *Watts*, and that both are entitled to sue. If it were entered into by one only, then the question would be, whether the other was jointly interested in the contract. By the agreement, *P. H. Watts* was to receive 300*l.* a year out of the profits, that is out of the net profits, which could not be ascertained until the end of the year. In the mean time the debt, when recovered, would be the joint property of both, and the money would belong to both, until the account was settled. In *Gilpin v. Endersby* (e), a person who by a partnership deed was exempted from all possibility of loss, was held to be a partner, though of an unusual kind.

BOLLAND, B.—I am of the same opinion. It is established by several cases both at law and in equity, that third parties are not affected by the secret contracts, *inter*, &c., of persons holding themselves out as contracting partners. That doctrine is fully considered in the case of *Waugh v. Carver*.

GURNEY, B., concurred.

Rule absolute.

(d) 2 Bing. N. C. 112; 2 Scott. 164. (e) 5 B. & A. 954.

KINE v. SEWELL.

SLANDER. The declaration stated, that before and at the time of the committing of the grievances by the defendant, the plaintiff carried on for B., employed C. a carpenter, to do some wood work, for which A. had given an estimate. The amount of the bill for this work exceeded the estimate, and B. applied to D. to recommend him a surveyor, upon which D. told B. that he had seen C. take away some of the quarterings. B. informed A. of it, who came to D., and asked him if he said so, and D. replied, "yes, I saw the man employed by you, take from B.'s house two long pieces of quartering. I hallooed to the man!"—*Held*, in an action of slander brought by C. against D., that this was a privileged communication, and that the plaintiff could not recover unless it appeared that the defendant was actuated by malicious motives.

A. having
contracted to
bu'ld a house

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the trade and business of a carpenter and builder, in which trade and business he had theretofore been, and then was retained and employed by one *Stephen Balcombe*, to perform certain work in and about the erection and building of a certain dwelling-house, which the said *S. Balcombe* was then retained to manage and complete for and at the request of one *William Barton*: that the plaintiff in the performance of his work as such carpenter and builder as aforesaid, was entrusted with the care and disposal of divers large quantities of timber, the property of the said *S. Balcombe*, then being in and upon the premises, for the purpose of being used and employed by the plaintiff in the building and erection of the said dwelling-house: that defendant intending to injure the plaintiff in his good name, fame, and credit, and in his said trade and business, and to bring him into public scandal, &c., with and amongst all his neighbours. and other good and worthy subjects of this realm, and to cause it to be suspected by those neighbours and subjects that the plaintiff had and was guilty of larceny as thereafter stated to have been charged, and imputed to him by the defendant, and to subject him to the pains and penalties by the law provided against and inflicted upon persons guilty thereof, and to harrass, impoverish, and ruin the plaintiff, theretofore to wit, on, &c. and in a certain discourse which the defendant then had of and concerning the plaintiff, and of and concerning the building and erection of the said dwelling-house, and of and concerning the said timber so in the care and disposal of the plaintiff as aforesaid, in the presence and hearing of the said *S. Balcombe*, and of divers other good and worthy subjects of this realm, falsely and maliciously spoke and published of and concerning the plaintiff, and of and concerning the building and erection of the said dwelling-house, and of and concerning the timber so in the care and disposal of the plaintiff as aforesaid, the false, scandalous, and defamatory words following, (that is to say): "I saw the man employed by you take from Mr. *Barton's* house, and carry away two long pieces of quartering, 4 by 2½, as much as he could carry; I hallooed to the man." It was alleged as special damage, that in consequence of the premises, *Balcombe* had wholly neglected and decline further to employ the plaintiff. *Plea*, not guilty.

At the trial before *Alderson, B.*, at the *Middlesex* Sittings in the present Term, it appeared that *Balcombe* had contracted to build a house for *Barton*, and that the former had employed the plaintiff as a carpenter to do some part of the work. *Balcombe* had made an estimate of this portion of the work, amounting to 16*l.*, but in consequence of some of the joists being omitted, the bill for the work amounted to 29*l.* *Barton* being dissatisfied with this, went to the defendant and asked him to recommend him a surveyor to measure the wood-work. The defendant then told *Barton* that he had seen the plaintiff take away some of the quarterings, upon which *Barton* went to *Balcombe*, and informed him of it. *Balcombe* then went to the defendant and said, "I am told you say you saw my man, *Kix*, take away some of the quarterings from Mr. *Barton's* premises," upon which the defendant uttered the words stated in the declaration. Another person of the name of *Fosdyke*, had also been employed on the work. *Balcombe* having communicated to the plaintiff what the defendant had said, the plaintiff went to the defendant's, and sent for *Fosdyke* there, and upon his coming, the plaintiff said to the defendant, "Is this the man?" the defendant replied, "No—you are the man." It also appeared, that though *Balcombe*

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on the first information had stopped the plaintiff's wages, yet he said, that no wood had been taken away that he was aware of; and *Fosdyke* also said, that none could have been taken without his missing it. The learned judge left it to the jury to say, whether the defendant intended to impute felony to the plaintiff; but at the same time, he thought that this was a privileged communication, and that the plaintiff could not recover, unless the jury believed that the defendant was actuated by malicious motives.

Humfrey now moved for a new trial, on the ground of misdirection.—This cannot be considered a privileged communication. The statement was purely gratuitous, as *Barton* was not inquiring about the wood, but merely asking the defendant to recommend him a surveyor. In *Toogood v. Spyring* (a), it was held that a communication to a fellow-workman of the plaintiff in the plaintiff's absence, was not protected, although made in the belief of its truth, if it were in point of fact false.—[*Alderson*, B.—There the person to whom the communication was made, was not a fellow-workman on the premises, when the cellar had been broken open, and therefore he had no interest.]—Here it is admitted that the plaintiff had not taken the wood, therefore as against him, this charge of the defendant is false.—[*Parke*, B.—If the defendant *bonâ fide* believed the plaintiff to be the man, is he liable? Is a man's mouth to be closed when he is asked whether he saw another person steal the inquirer's property? I have always understood that such party, if he believes the statements to be true, is excused, but in that case it is a question for the jury, whether it is probable from the words and circumstances, that he did so believe them.]—In *Child v. Affleck*, which was an action by a servant against her mistress for a libel, in giving a character; it was held, that the plaintiff might shew implied malice, by directly negativing the charge, and *Littledale*, J., says, "If indeed the plaintiff had distinctly proved the falsehood of the statement, the case would have assumed a different shape." *Martin v. Strong* (b) is an authority in point; there it was held, that words spoken by a subscriber to a charity, in answer to inquiries by another subscriber, respecting the conduct of a medical man, in his attendance upon the objects of the charity, are not, merely on account of those circumstances, a privileged communication.—[*Parke*, B.—There the question, about which the subscribers had met, had been determined, and there could be no interest.]

PARKE, B.—In this case I think no rule ought to be granted. I feel satisfied of the propriety of the law as laid down in *Toogood v. Spyring* (a); and that where a party who is interested in discovering a wrong-doer comes and makes inquiries, and a person in answer, *bonâ fide* states that which he knows, or believes to be true, such communication is privileged, although it may possibly affect the character of a third person. The consequence is, that in such a case no action can be maintained by the party whose character is injured, unless he can shew that the person who made the communication was actuated by malicious motives. That is the express view which the learned judge has taken of the case, and I think he has properly left the question to the jury.

(a) 1 C. M. & R. 181.

(b) 5 Ad. & E. 535.

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Now this application has principally rested on the authority of *Martin v. Strong*. It appears from the report of that case, that Mrs. Hicks, who was a subscriber to the institution in which the plaintiff was employed as a medical assistant, questioned the defendant either after or before he had left the chair, as to some complaints which had been made during the meeting, and the defendant made answer in the words set out in the declaration. I think that the mere circumstance of her being a subscriber to the institution, gave her no right to inquire into the plaintiff's character, especially as the object of the meeting was at an end. The learned judge desired the jury to consider whether the conversation was fairly a part of the proceedings of the meeting, and the jury found in effect, that it was not. If the observations had been made in a matter of contest, and the contest had been whether that person should be elected, it appears to me that it would have been a privileged communication.

GURNEY, B.—I think the learned judge very properly left the question to the jury.

ALDERSON, B.—The case of *Martin v. Strong*, seems to have turned entirely upon the question, whether that which took place formed any part of the proceedings of the meeting. But it is clear, that the mere circumstance of being a subscriber to a charity, gives no right to a person to talk of the concerns and character of a medical man employed in the charity, unless it becomes absolutely necessary, in order to carry some particular object into effect.

Rule refused.

CLARK v. DIGNUM.

An attachment for non-payment of costs, cannot be supported upon the demand of a third person, to whom the attorney has given an authority to receive them.

BARSTOW moved for a rule nisi, to set aside an attachment for non-payment of costs. The objection was, that the costs had not been demanded by the attorney in the cause, but by a person to whom he had given a warrant of attorney for that purpose. It was submitted, that assuming that an attorney could delegate his authority to another person, he should have executed the deed in the name of his principal.

Humfrey shewed cause and contended, that if the attorney had a power to make the warrant of attorney, he would undoubtedly have a power to make it to receive the costs for him.

PARKE, B.—This is a very summary proceeding, and the Court cannot grant an attachment, unless all the formal steps have been taken. An attorney cannot delegate his power to another. A demand of costs by the attorney himself is sufficient, because he represents the principal, and if the money is paid to the attorney, that is a good discharge. The rule *delegatus non potest delegare* applies here. The master says, that this is not sufficient.

Rule absolute.

WALLER v. ANDREWS and another.

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DEBT on a memorandum of agreement, by which the plaintiff demised to the defendants certain marsh lands for the term of fourteen years, from the 1st *January*, 1827, at and for the clear annual rent of 400*l.*, payable half yearly, by equal portions, subject to, amongst others, the following conditions and provisions, to wit, that *the defendants should pay and discharge all outgoings whatsoever, rates, taxes, scots, &c., whether parochial or parliamentary*, that then were, or should be thereafter charged or chargeable upon or on account of the said marsh lands, (the then present land-tax only excepted). The declaration alleged, as a breach, that although the defendants did in the first and several succeeding years of the said term, continually until the 1st *January*, 1835, pay to the plaintiff a certain part of the annual rent of 400*l.* which accrued due under and by virtue of the said demise, in each and every of those years, to wit, the sum of 350*l.*, yet he had not at any time paid the residue of the said rent of 400*l.* for any or either of those years; and that there was, and remained due to the plaintiff, the sum of 50*l.*, parcel and residue of the said sum of 400*l.* for rent, for and in respect of the demised premises, under and by virtue of the demise for the first year of the said term, to wit, on the 1st *January*, 1828. There were similar averments for the second, third, fourth, fifth, sixth, seventh, and eighth years of the term. The defendants pleaded; *First*, a payment to the plaintiff of divers sums of money, together amounting to the aggregate amount of the said several sums of 50*l.*, in full satisfaction and discharge of the several sums of 50*l.* in the declaration mentioned; *Secondly*, as to 175*l.*, the Statute of Limitations.

At the trial, before Lord *Denman*, C. J., at the last Assizes for the county of *Kent*, it appeared, that in the year 1831, the commissioners of sewers for the eastern division of *Kent* had expended the sum of 5,000*l.* in rebuilding and erecting a sluice, and other works, at *Stonar*, in that county. To meet this expenditure, the commissioners, on the 7th *January*, 1831, assessed the owners and occupiers of lands, specified in a schedule, (including the premises in question), in certain sums, payable at stated periods, and decreed that four-fifths of such sums should be taxed, assessed, and charged upon the owners of such lands, and the remaining one-fifth upon the occupiers respectively. The defendants were accustomed to pay their rent to Messrs. *Buller* and *Rashleigh*, the plaintiff's agents; and they not having seen the agreement, which had been mislaid by a third party, deducted from the rent the four-fifths of the sewers rate charged upon the owners, and gave a receipt for the balance. The receipt for the year 1831 was as follows:—

Received of Mr. *Andrews*, the sum of 17*l.* 18*s.* 10*d.*, balance of a half-year's rent at *Hodmarsh*, due at *Midsummer* last, to *Thomas Waller*, Esq., for whose use it is received by us,

Buller and Rashleigh.

By memorandum of agreement, certain marsh lands were demised by the plaintiff to the defendants, subject to a condition that the defendants should pay all outgoings whatsoever, rates, taxes, scots, whether parochial or parliamentary, that then were or should thereafter be charged or chargeable upon or on account of the said marsh lands (the then present land-tax only excepted):—*Held*, that an extraordinary assessment made by the commissioners of sewers, was a "parliamentary scot," within the meaning of the agreement.

Four-fifths of the rate were assessed upon the owners, and one-fifth upon the occupiers. For four years the defendants, on payment of their rent, were allowed by the plaintiff's agents (who were ignorant of the agreement) to deduct from the amount of rent the four-fifths of the rate, and a receipt was given for the balance:—*Held*, in an action to recover the sums

so allowed, as arrears of rent, that the facts supported a plea of payment

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And on the back of the receipt, the account was thus stated:—

| | |
|--------------------|-----------|
| Rent | £ 200 |
| | £ s. d. |
| Land Tax | 6 5 0 |
| Scot | 21 16 2 |
| Cash | 171 18 10 |
| | <hr/> |
| | 200 0 0 |

In *December*, 1835, the agreement was discovered, and the plaintiff claimed to be repaid the sums which had been allowed by his agents, on account of this scot. On the part of the defendants, it was contended, that this was not a tax which they were bound to pay; and even admitting that they were, that it could not now be recovered, as the rent was acknowledged to have been paid. The learned judge thought this a parliamentary assessment within the terms of the agreement, and that the defendants had not proved the plea of payment. The jury found a verdict for the plaintiff, and the learned judge reserved leave to the defendants to move to enter a nonsuit, if the Court should be of opinion that this was not a scot or tax, within the meaning of the agreement, or that the plea had been proved. *Platt* having in *Michaelmas* Term obtained a rule accordingly,

Thesiger and *Channell* shewed cause.—The terms of the agreement are sufficiently large to include this rate. The words, “whether parochial or parliamentary,” are meant as words of extension, and not of qualification. The agreement seems expressly framed to comprehend contingencies of this nature; it mentions all taxes “that then were or should be thereafter charged or chargeable,” the only exception being that of the land-tax. This is strictly a parliamentary scot, having been imposed by the commissioners under the authority of parliament. The term “scot,” especially applies to a tax of this description. *Secondly*, the allowances have been clearly made by mistake, and the Court will assist the plaintiff in recovering back that which it is against good conscience for the defendant to retain. Besides, the plea has not been supported; the defendants should have shewn a payment in fact.

Platt and *Starr*, *contrd.*—This is neither a parochial nor a parliamentary tax. Though the right to impose a tax may be given by Statute, yet it will take its designation from the mode in which it is levied; thus the power to make a poor rate is derived from Statute, and yet it is a parochial tax. It is true that the commissioners of sewers, act by virtue of an authority derived from parliament, but that circumstance alone is not sufficient to render their assessment a parliamentary tax. In *Brewster v. Kitchel* (a), Lord *Holt* observes, “there be other taxes, not parliamentary, as repair of churches, commission of sewers; for any imposition which takes away part of his goods or rent, is a tax.” It is said, that the term “scot” is peculiarly applicable to a tax of this description, but in *Spelman*, 505, it is stated to signify only

(a) 2 Salk. 615; 1 Ld. Ray. 318.

‘a customary contribution laid upon all subjects according to their ability;’ and in *Cowell's Interpreter of Law Words*, “a customary contribution upon all subjects after their ability.” But at all events, the agreement could only have been intended to apply to the ordinary taxes, and not to one arising from an unforeseen casualty. Secondly, the plea of payment is supported by the evidence; though the rent was not paid in money, yet it was allowed in account, which is the same thing. In *Branston v. Robins* (b), a landlord's receiver allowed the tenant to make a deduction in respect of a payment for land-tax every year, for seventeen years, greater than the landlord was liable to pay, the landlord knowing, or having the means of knowing, all the facts; and it was held that he could not distrain for the amount erroneously allowed. The case is the same, as if the whole rent had been paid to the landlord and returned by him to the tenant. *Andrew v. Hancock* (c); *Skyring v. Greenwood* (d); *Jeffs v. Wood* (e), are authorities in point.

Cur. adv. vult.

PARKE, B., now delivered the judgment of the Court. After stating the facts, his lordship proceeded.—The first question reserved for the consideration of the Court is, whether a sewers' rate on the landlord in respect of the permanent improvement of the land by a new sluice, falls within the terms of the agreement; we think it does, for though Lord Holt (f) raises a doubt whether this could be properly considered as a *parliamentary tax*, and therefore if the words “parliamentary taxes” only had been mentioned, it might have been questionable whether the sewers' rate was included, yet when such very extensive words as those in the agreement are used, that is, “all outgoings, rates, and scots,” which last word is *commonly* applied to sewers' rate on *marsh lands*, we think that the sewers' rate is included. It is a “scot” and would be comprised in the terms, “all *parliamentary scots*,” though not, perhaps, properly and technically so, as not being imposed *directly* by parliament, but by commissioners deriving their authority under an Act of Parliament.

The next question is, whether, on the evidence in the case, the plea of payment was proved? What appears to have been done was this:—on each half-year's settlement for the rent due, the landlord's sewers' rate, which had been paid by the tenant, was allowed *as a part payment of the rent* by the tenant, and a receipt given for the balance, expressing it to be such. This amounts to an agreement that this portion of the rent shall be considered as paid, and places the parties in the same situation as if the amount had been actually paid in money to the landlord, and then returned by him to the tenant to repay the sewers' rate, which he had disbursed. Such a transaction may be described in pleading, as payment, *Branston v. Robins* (b), *Wade v. Wilson* (g). If there had been any fraud on the part of the tenant in making the agreement with the landlord, that the sewers' rate should be allowed as payment; if, for instance, he had wilfully misrepresented the contents of the lease, then indeed, the whole agreement would probably have been rendered void, and there would have been no payment, nor would there

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(b) 4 Bing. 11.

(c) 1 B. & P. 37.

(d) 4 B. & C. 281; 6 D. & R. 401.

(e) 2 P. Wms. 298.

(f) 2 Salk. 615.

(g) 1 East, 200.

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have been any, if the agreement had been *conditional* that the sewers' rate should be allowed as payment, if it turned out that the landlord was bound to pay that rate, otherwise not. Here, however, there was neither *fraud* nor *condition* expressed or implied; the tenant might, *bonā fide*, suppose that he was not bound to pay this species of sewers' rate, and the agreement to allow it as payment was unconditional. Whether the plaintiff could recover back this money, as money paid under a mistake of fact, is a question upon which we are not called upon to pronounce any opinion.

Rule absolute.

HARE and another, Assignees of JONES, a Bankrupt, v. WARING.

In *assumpsit* by the assignees of a bankrupt, for not accepting certain shares in the *Great Western Railway*, which the bankrupt contracted before the bankruptcy to sell the defendant, and to convey to him on or before a certain day, which was after the bankruptcy; the declaration averred, that the plaintiffs were proprietors of the shares, and that they tendered certificates of them to the defendant. The defendant pleaded that *J.* did not commit an act of bankruptcy; that the act of bankruptcy upon which he was declared a

ASSUMPSIT. The declaration stated that before *Jones* became bankrupt, and after the making of an Act of Parliament, passed in the session of the fifth and sixth years of *William* the fourth, (for making the *Great Western Railway*) the defendant bargained for and bought of *Jones*, and *Jones* then sold to the defendant one hundred shares in the undertaking called the *Great Western Railway*, to be conveyed to the defendant on or before the 31st day of *March*, then next, and then to be paid for by the defendant: and therefore, in consideration of the premises, and that *Jones* had then promised the defendant at his request, that the certificates of the said shares should be delivered, and that the said shares should be conveyed to the defendant at the time and in the manner aforesaid, the defendant then promised *Jones* to accept and pay for the same, at the time and in the manner aforesaid. Averment, that after the bankruptcy, and before and at the time specified in the contract, to wit, on the 31st day of *March*, 1837, the plaintiffs so being such assignees as aforesaid, tendered and offered to the defendants the certificates of one hundred shares in the said undertaking, and also offered to the defendant to convey to him the said one hundred shares in the manner, and according to the form by the said Statute in that behalf provided, they the plaintiffs then being the proprietors of the said one hundred shares, then having a good right and title to convey the same in manner aforesaid. The defendant pleaded *non assumpsit* and several other pleas, of which the following only are material. *Secondly*, that *Jones* did not commit any act of bankruptcy whatsoever before the issuing of the *fiat*. *Thirdly*, that the act of bankruptcy upon, and under which alone *Jones* was found and declared to be such bankrupt as aforesaid, was an act of bankruptcy wholly concerted un-

bankrupt was concerted between *J.* and one of the plaintiffs, that the plaintiffs were not proprietors of the said shares, and that they did not tender the certificates to the defendant.

The act of bankruptcy was, that *J.* had given directions to his son to deny him to any one who might call, but it did not appear that any person actually called, or that *J.* secreted himself:—*Semble*, that this was not an act of bankruptcy.

Semble, that this was not a case within the 92d sec. of the 6 G. 4, c. 16, by which the depositions are made conclusive evidence of the matters contained in them, inasmuch as the bankrupt could not have fulfilled his contract on the day specified, but that even if it were within that section, evidence might be given to shew that the bankruptcy was concerted.

In order to prove their proprietorship of the shares, the plaintiffs produced the transfer-book of the Company, in which they were entered as transferees:—*Held*, that there was not sufficient evidence of their title.

The certificates tendered by the plaintiffs did not contain the names of the plaintiffs as original proprietors, nor had they any indorsement of transfer to them:—*Held*, that such certificates did not shew a title in the plaintiffs to convey the shares.

lawfully between the said *Jones* and the plaintiff *Hare*, which said plaintiff was the petitioning creditor, and that *Jones* did not at any time commit any other act of bankruptcy. *Sixthly*, that the plaintiffs were not the proprietors of the said one hundred shares, or of any of them, nor had they good right or title to convey the same. *Seventhly*, that the plaintiffs did not tender or offer to the defendant the certificates of the said shares, nor did they offer to convey the said shares, or any of them, in the manner, and according to the form by the said statute provided. To the third plea, the plaintiffs replied that the act of bankruptcy upon, and under which *Jones* was found and declared a bankrupt was and is valid in law, and was not nor is concerted.

At the trial before *Tindal, C. J.*, at the last *Bristol Assizes*, it appeared, that on the 13th *December*, 1836, the bankrupt sold to the defendant one hundred shares in the *Great Western Railway*, on which occasion, the following memorandum, signed by the defendant, was delivered to *Jones*.

"Bought through *George Edwards, Esq.*, broker, of *E. Jones, Esq.*, one hundred shares in the *Great Western Railway*, at 20*l.* per share, *præ*, for on or before the 31st *March* next.

"*Saml. Waring.*"

A corresponding memorandum was delivered by the broker to the defendant. On the 13th *January*, *Jones*, having become embarrassed in his circumstances, directed his son to deny him to any one who might call; it did not appear, however, that any person was actually denied. A fiat of bankruptcy issued against *Jones*, on the 17th *January*, the plaintiff *Hare*, being the petitioning creditor. The depositions were given in evidence on the part of the plaintiffs. In the month of *March* the plaintiff bought one hundred shares in the *Great Western Railway*, for the purpose of transferring them to the defendant in performance of *Jones's* contract. In order to prove that they were the owners of the shares, the plaintiffs produced the *Railway Company's* register book of transfers, in which their names were entered as transferees of these one hundred shares before the 31st *March*. In consequence of the defendants having refused to complete the contract, on the 7th of *April* these shares were sold by the plaintiffs to a third party. In support of the seventh issue, the plaintiffs put in certain certificates of shares which corresponded in the numbers with those entered in the transfer book, and were in the form required by the 147th section of the Act (*a*), but the name of the

(a) 6 & 7 Will. 4, c. 107, s. 3. It shall be lawful for the said company to raise amongst themselves any sum of money for making and maintaining the said railway, and other works by this Act authorised, not exceeding in the whole the sum of 2,500,000*l.*, the whole to be divided into shares of 100*l.* each, and such shares shall be numbered, beginning with number one, in arithmetical progression, and every such share shall be distinguished by the number to be applied to the same, and the said shares shall be, and hereby are vested in the several parties taking the same, and their several and respective successors,

executors, administrators, and assigns, to their proper use and benefit proportionably to the sum they shall severally contribute, and all persons and corporations and their several and respective successors, executors, administrators, and assigns, who have subscribed, or shall severally subscribe for one or more share or shares, or such sum or sums as shall be demanded in lieu thereof, towards the said undertaking, and other the purposes of the said subscription, shall be entitled to, and receive in proportionable parts according to the respective sums so by them respectively paid, the net profits and advantages

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party who had previously held them appeared on the face of them as the proprietor, and there was no indorsement of transfer to the bankrupt or the plaintiffs, as required by sec. 158. It was proved, that these certificates were tendered to the defendant on the 31st *March*, and refused by him.

which shall arise or accrue from, or by the rates, tolls, and other sums of money to be received by the said company, as, and when the same shall be divided by the authority of the Act.

Sec. 147. The said Company shall, and they are hereby required at the first, or some subsequent general meeting, and afterwards from time to time, as occasion may require, to cause the names of the several corporations, and the names and additions of the several persons who shall then be, or who shall from time to time thereafter become entitled to shares in the said undertaking, with the number of shares which they are respectively entitled to, and the amount of the subscriptions paid thereon, and also the proper number by which every share shall be distinguished, to be fairly and distinctly entered in a book to be kept by the said Company, and after such entry made, to cause their common seal to be affixed thereto, and the said Company shall from time to time cause a certificate or ticket, with the common seal of the said Company affixed thereto, to be delivered to every such proprietor, on demand, specifying the share or shares to which he is entitled in the said undertaking, such proprietor paying to the said Company the sum of 2s. 6d., and no more, for every such certificate or ticket, and such certificate or ticket shall be admitted in all Courts whatever as *prima facie* evidence of the title of such respective proprietors, their successors, executors, administrators, and assigns, to the share or shares therein specified, *but the want of such certificate or ticket shall not hinder or prevent the proprietor of any of the said shares from selling and disposing thereof*, and such certificate or ticket may be in the words, or to the effect following, that is to say,

"The Great Western Railway Company.

"Number

"These are to certify that, A. B. of , is the proprietor of the share (or shares) Number of the Great Western Railway Company, subject to the rules, regulations, and orders of the said Company. Given under the common seal of the said Company, the day of in the year of our Lord,

Sec. 149 "The said Company shall

in some proper book to be provided by the said Company for that purpose, enter and keep a true account of the places of abode of the several proprietors of the said undertaking, and of the several persons or corporations who shall from time to time become proprietors thereof, or be entitled to any share therein, and every proprietor of the said undertaking, (or in case of a corporation, the clerk or agent of such corporation, duly appointed), may at all times have recourse to, and peruse such book gratis, and may demand and have copies thereof, or of any part thereof, paying at, and after the rate of 6d. for every one hundred words so copied.

Sec. 157. "That all the shares and proportions of and in the said undertaking, or joint stock, or fund of the said Company shall to all intents and purposes be deemed personal estate, and be transmissible as such, and shall not be deemed to be of the nature of real property.

Sec. 158. "It shall be lawful for the several proprietors of shares in the said undertaking, and their respective executors, administrators, and successors to sell and dispose of any shares to which they shall be entitled therein, subject to the rules and conditions herein mentioned, and the form and conveyance of such shares may be in the following words, or to the like effect, varying the names and descriptions of the contracting parties; as the case may require, that is to say:—

I, A. B. of in consideration of the sum of paid to me, by C. D. of do hereby assign and transfer to the said C. D. share numbered of and in the undertaking called the Great Western Railway, to hold unto the said C. D. his executors, administrators, and assigns, (or successors and assigns), subject to the several conditions on which I hold the same immediately before the execution hereof; and I the said C. D., do hereby agree to accept and take the said share subject to the conditions aforesaid. As witness our hands and seals the day of

And on every such sale, the deed or conveyance, (being executed by the seller and purchaser), shall be kept by the said Company, or by some secretary or clerk of the said Company, who shall enter in some book to be kept for

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A witness for the plaintiffs, on his cross-examination, stated, that according to usage and custom, where the contract was to deliver *on or before* a certain day, the option was with the buyer, and that, therefore, the defendant might have called upon the bankrupt to complete the sale, at any time before the 31st *March*. Evidence was also given for the purpose of impeaching the bankruptcy, by shewing that it was concerted between the bankrupt and the plaintiff *Hare*. This evidence was objected to on the part of the plaintiffs, on the ground that by the 19th section of the 6 *Geo. 4*, c. 16, the depositions were conclusive evidence of the act of bankruptcy, *Fox v. Mahoney (b)*, was referred to. The learned judge admitted the evidence, and left the question to the jury, who found that the act of bankruptcy was concerted; the jury also found, that on the 13th *January* the bankrupt began to keep his house with intent to delay his creditors; and a verdict was entered for the plaintiffs on the second issue. The learned judge also directed a verdict for the plaintiffs on the first and sixth issues, and for the defendant on the third and seventh, reserving leave to the plaintiffs and defendant respectively, to move to enter a verdict for them on such of those pleas as the Court should think fit.

Cross rules were accordingly obtained by *Erle* for the plaintiffs, and *Bompas*, serjt., for the defendant.

Erle, Greenwood, and Butt, for the plaintiff.—The first question is, whether there was evidence of a valid act of bankruptcy; that will depend first, upon whether the conduct of *Jones* on the 13th *January*, amounted in law to an act of bankruptcy; and secondly, admitting that it did, whether the legal effect of it is not avoided by the finding of the jury, that it was concerted, and whether evidence of concert was not excluded by the 92d section of the 6 *Geo. 4*, c. 16. It was entirely a question for the jury, to say with what intention *Jones* directed that he should be denied, and they have found that he began to keep house with an intention to delay his creditors. In *Lloyd v. Heathcote (c)*, it was held that a general order to deny the party was of itself sufficient evidence of a beginning to keep house. There is an inconsistency in the finding on the second and third issues; by the finding on the second issue, it would appear that a valid act of bankruptcy had been committed; but on the third issue, if entered for the defendant, there would be an admission that the act of bankruptcy on which the fiat issued, was concerted.—[*Parke, B.*—There is no inconsistency. The finding on the second issue is, that it is an act of bankruptcy, which, *per se*, would be

that purpose a memorial of such transfer and sale, and endorse the entry of such memorial on such said deed of sale or transfer, for which entry and indorsement the sum of 2s. 6d. and no more, shall be paid to the said Company, and the said Company, or some secretary, or clerk, as aforesaid, is hereby required to make such entry or memorial accordingly, and *on demand* to make an indorsement of such transfer on the back of the certificate of each share so sold, and deliver the same to the purchaser for his security, for which indorsement no more than 2s. 6d. shall be paid; and

each indorsement being signed by such secretary or clerk shall be considered in every respect the same as a new certificate, and until such memorial shall have been made and entered as before directed, the seller thereof shall be held, and remain liable for all future calls, and the purchaser shall have no part or share of the profits of the said undertaking, nor any interest in respect of such shares, paid to him, nor any vote in respect thereof as a proprietor of the said undertaking."

(b) 2 C. & J. 325.

(c) 2 B. & C. 388; 5 B. Moore, 129.

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valid; on the third, that it was concerted. If concert no longer invalidates a commission, then that plea would appear to be bad, *non obstante veredicto*, that is, if the depositions are conclusive evidence.]—In *Marshall v. Barkworth* (d), the Court held, that notwithstanding the provisions of the 1 & 2 W. 4, c. 56, s. 42, a concerted act of bankruptcy by assignment of a trader's effects, still invalidates a commission founded upon it, as against the parties to the concert; but as the legislature has expressly sanctioned the concerting one particular act of bankruptcy, viz. the filing of a declaration of insolvency, it would seem difficult to say that mere concert, without any fraudulent intention, and in order to benefit the general body of creditors, is sufficient to avoid the fiat; but the evidence of concert ought not to have been admitted. The 6 Geo. 4, c. 16, s. 92, provides, that if the bankrupt does not, within two calendar months after the adjudication, give notice of his intention to dispute the commission, &c., "the depositions taken before the commissioners at the time of, or previous to the adjudication of the petitioning creditor's debt, and of the trading and *act or acts of bankruptcy*, shall be conclusive evidence of the matter therein contained in all actions brought by the assignees for any debt or demand for which the bankrupt might have sustained any action." The true construction of this section is, that if on the face of the depositions a valid act of bankruptcy appears, it shall be taken to be conclusive for all purposes. The object of the legislature has been to prevent debtors to the bankrupt's estate from harrassing the assignees, by compelling them on every occasion to prove the bankruptcy. In *Young v. Timmings* (e), it was held, that in a case within the 92d section, when the petitioning creditor's debt was proved by the depositions, the defendant could not prove that the debt was a fraudulent contrivance between the bankrupt and the petitioning creditor. The real question here is, whether this is a case within the 92d section; whether this is a contract upon which the bankrupt could have sued. *Fox v. Mahony* is an authority in point; that was an action of trover to recover the value of goods deposited by the bankrupt with the defendant, and the conversion took place after the bankruptcy, yet it was held, that the depositions were conclusive evidence; and Lord *Lyndhurst*, C. B., said, "I am of opinion that the intention of the legislature was, that in cases where, in the event of there being no bankruptcy, the bankrupt could have maintained an action, and where no such notice as is prescribed in the section has been given, the depositions should be received as conclusive evidence."—[*Parke*, B.—There Lord *Lyndhurst* rests his opinion upon the ground, that if the defendant was not bound to pay the assignees, he was bound to pay the bankrupt; but here the defendant must be liable to the assignees alone, because the bankrupt could not sue on this contract until he had first done certain acts.]—In *Smith v. Woodward* (f), the bankrupt had lent goods to the defendant with permission to keep them until wanted back, and they were not re-demanded until after the bankruptcy; *Patteson*, J., held, that the 92d section of the Bankrupt Act applied to the case, and that it was not necessary that the demand should have been such as was perfect in the bankrupt at the time of his bankruptcy, and he refers to the case of a bill of exchange not due until after the bankruptcy.—[*Parke*, B.—

(d) 4 B. & Ad. 508; 1 Nev. & M.
279.

(e) 1 C. & J. 148; 1 Tyr. 15.
(f) 4 C. & P. 541.

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In the case of a bill of exchange, nothing remains but for the bill to arrive at maturity, and the defendant must pay to one party or the other. My observations apply to cases in which there is some act to be done by the party to the contract, before he can sue upon it.]—*Jones v. Port (g)*, and *Kitchener v. Power (h)*, are also authorities in favour of the plaintiffs.—[*Parke, B.*—Where the defendant is, at all events, liable either to the bankrupt or the assignees, the depositions are evidence; if he is liable to the assignees only, they are not evidence, unless the assignees fully represent the bankrupt; here they do not, because there has been no tender by him.]

Secondly. There was sufficient evidence, that the plaintiffs were the owners of the shares. It was proved that they were registered as the vendors, in the books of the Company, kept under the directors of the Act, and that after the tender to the defendant, they disposed of the shares to a third party. It was not necessary to shew a formal transfer to themselves from the original proprietors. The third section of the Act defines a share to be a liability to calls and a right to profits, the proprietorship of shares may, therefore, exist without the evidences of it, which are merely provided for the greater facility of sale and transfer.

Thirdly. It was not necessary to prove a tender of the certificates. The 147th section expressly provides, that the want of certificates is not to prevent the proprietor from selling his shares. But that even admitting the tender was material, the certificates tendered were sufficient, since the indorsement of transfer could, under the 158th section, have been made at any time on demand. At all events, the defendants having made no objection on this ground at the time of the tender, cannot now insist upon it.

The case having been adjourned to another day, on its being called on,

PARKE, B., said, Since this case was last before the Court, we have had an opportunity of considering it, and I will now state what the impression of the Court is on the argument already heard as to each of the material issues. The first question is, whether the issue found for the plaintiffs on the plea of *non assumpsit*, ought to be entered for the defendant. It was an action brought on a contract for the sale of shares in the *Great Western Railway*, stated in the declaration to have been a contract to deliver the shares on or before the 31st *March*, then next. The conveyance is to come from the plaintiffs, and the rule of law in the construction of such a contract would be, that the option of the time would be with the party who was to do the first act. My brother *Bompas* wished, at the trial, to shew, that according to the usage and custom prevailing in contracts of this kind, the option was with the purchaser; we think, however, that the verdict ought not to be entered for the defendant on this issue, on the ground that the objection was not taken in form at the trial; if it had, the Lord Chief Justice might have amended the record, if it was not matter material to the parties. I cannot say, in this case, that this would have been an amendment which could have been made, for our present impression is, that it is a matter which would have been material: if the option had depended on the defendant, he might have set up a totally different defence; and therefore, we are not disposed to think that this is a case in which an amendment could have been made. But it is quite clear

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that the objection was not formally taken; if it had been, and if the attention of the plaintiffs' counsel had been called to it, he would have re-examined the witness, in order to shew that there was no prevailing usage to alter the contract in that respect: the Court, as at present advised, think the verdict ought to stand for the plaintiff upon the first issue. Then as to the second issue, which has been found by the jury for the plaintiffs, no point has been reserved by the Lord Chief Justice; he left the question on that issue to the jury, and the objection made to this is, that independently of the act of bankruptcy stated in the depositions, there was no act of bankruptcy proved in the case. The plaintiffs insisted that there was an act of bankruptcy committed on the 13th *January*, by an order on the part of the bankrupt to deny him to any one who called; but no person appears to have been denied, nor any thing done in pursuance of this order; and a mere direction by a bankrupt to be denied, not followed up by shutting up the doors, or retreating to a distant part of the house, is not in itself an act of bankruptcy, and for that, there is the authority of the case of *Fisher v. Boucher* (i). That point, however, it is not necessary for us to decide, because the Lord Chief Justice has reserved no power to decide it, and we pronounce no conclusive opinion upon it; the only effect indeed of this objection would be, if we thought there was no act of bankruptcy, to have a new trial; but as this matter does not arise, we pronounce no judgment upon it, though the Court do entertain a strong inclination of opinion, and the authority I have referred to confirms it, that this would not be a good act of bankruptcy. With respect to the question, whether the depositions are admissible in this case, it is not necessary on that point to give any opinion. Certainly, the Court feel considerable doubt whether, in this case, the depositions would be evidence, for this is a case in which the bankrupt could, under no circumstances, have brought the action. There was evidence against the bankrupt of the contract being rescinded; but independently of that, from the nature of the case itself, the bankrupt could not maintain any action on this contract. We doubt whether *Smith v. Woodward* goes so far as to decide that the depositions would be conclusive evidence in the case, but it is not necessary for us to determine that point here. As to the second issue, therefore, the verdict is right. Then as to the third (the question of the concerted act of bankruptcy), the Lord Chief Justice was of opinion, that although the depositions might be conclusive evidence of the matters contained in them, and of the facts recited by them, yet that would not exclude the defendant from shewing, that although the facts were true, the plaintiffs could not avail themselves of the act of bankruptcy, because one of them was a party to the act of denial stated in the depositions, that being collateral to, and quite beside the facts stated in the depositions. At first, it occurred to me, that the case of *Young v. Timmins* was an authority to the contrary; but on considering the case, I think it is not, for all that was decided was, that the fact there stated of the bankrupt being indebted, must be considered as conclusively proved, and that it was not competent for the other side to shew that he was not indebted, because the deed was concocted in fraud. In this case, if the act of bankruptcy stated in the depositions was concerted, that was a matter beside

(i) 10 B. & C. 705.

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all the evidence set forth in the depositions, and therefore, the Court concurs with the Lord Chief Justice in thinking that issue was properly found for the defendant. And it is not necessary for us to decide, whether the plea be good *non obstante veredicto*, or not, though I am inclined to think, on consideration, that it would be bad, as it does not state what the act of bankruptcy was. There is no doubt that an act of bankruptcy might in some cases be lawfully concerted; for instance, by a voluntary declaration of insolvency; nor is there any case which has decided that an act of bankruptcy, by lying in prison, would not support a commission, even though the petitioning creditor might know it was the intention of the bankrupt to lie in prison. But it is unnecessary here to pronounce any opinion upon that. Then we come to the sixth plea, on which the verdict is for the plaintiffs; that plea is, that the plaintiffs were not the proprietors of the shares mentioned in the declaration, and had not good right and title to convey them. Now it appears, on looking at the notes of the learned judge, that the only proof really given of the plaintiffs being proprietors, was, that their names were inserted in the transfer book of the Company as being proprietors: the Lord Chief Justice thought the book was not evidence to prove the fact, but he directed the verdict to be entered for the plaintiffs, giving leave to move on this point. The question we have to decide on that issue therefore is, whether the book was any evidence of the proprietorship. The Act of Parliament does not make it so, it makes the entry in the book essential to complete the title, in order that the transferee should receive the profits, and to exonerate previous parties from the liability to pay; the Act of Parliament requires that there should be an entry in a book, and the only use of that would be, to shew that the title of the plaintiffs, if they had any, was complete. We may illustrate the question, whether this be evidence of title, by a case of frequent occurrence; when it is essential to a plaintiff to prove that an estate had been conveyed to him in a registered county, would it be enough, without producing the deed of conveyance, to shew that a memorial of the deed had been entered in the register of the county? Clearly not. There is no evidence of title at all, unless this book was evidence, and therefore, that sixth issue, which is now entered for the plaintiffs, must be entered for the defendant. Then we come to the seventh plea, by which the defendant denies that the plaintiffs tendered certificates of the shares, or were ready to convey them. Now with respect to so much of this issue as relates to the certificates, we concur with the Lord Chief Justice in thinking that these certificates, in respect of which the tender was made to the defendant, were not proper certificates within the meaning of the allegation in the declaration. The contract is there stated, to be a contract on the part of the bankrupt to cause the shares to be conveyed to the defendant on or before the 31st *March*, and it is alleged that the plaintiffs tendered certificates of these shares according to the Act of Parliament. What then is the meaning of the term "certificate," and why is it introduced there? We must refer to the Act of Parliament to ascertain what the "certificate" means; and the construction which I put on the meaning of the 147th and 158th sections, taken together, is, that the certificates produced must be certificates shewing the title of the party who is to convey; and therefore, that the tender ought to have been either of certificates in the names of the assignees themselves, or in the names of the original proprietors, with indorsements upon them of the transfer to the assignees. It is said, however, that this is

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too strict a construction to be put upon the Act ; that the possession of the certificate is of itself evidence of the right of the party producing it to convey the shares. It might be, if the plaintiffs had produced the certificates of some original proprietor, and then regularly deduced the title from such original proprietor to themselves ; that might have been sufficient, although my present impression is, that it would not. Here, however, there was no proof of any conveyance from the person in whose name the certificates were, so as to connect that person's name with the assignees. These certificates would be *prima facie* evidence of somebody else, not the assignees, being entitled to the shares, and there is no proof of the assignees deriving the title from that party by assignment, even assuming that to be sufficient. We are satisfied that the true meaning of the contract is, that the party is to convey and deliver certificates, shewing, either on the face of them, or from the indorsements, that the title is in the person conveying. We therefore entirely concur with the Lord Chief Justice, in thinking, that the seventh issue ought to be found for the defendant. That disposes of all the material points in difference in the case.

Judgment for the defendant accordingly.

[*Bompas*, Serjt., *Crowder*, and *Manning*, were to have argued for the defendant.]

THE END OF HILARY TERM.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF EXCHEQUER,

IN

Easter Term, 1 Victoria, 1838.

BAXTER v. BAILEY.

Eschequer.

BALL had obtained a rule calling upon the plaintiff to shew cause why the defendant should not be discharged out of custody, on the ground that he had not been charged in execution within two terms of the time of his render, pursuant to 1 *Reg. Gen. H. T. 2 Will. 4*, s. 85 (a). The cause was tried at the *Croydon* Summer Assizes, in 1837; on the 29th *December*, in the same year, the plaintiff commenced an action against the bail in discharge of whom the defendant rendered on the 10th day of *January*, 1838, being the last day of *Michaelmas Vacation*. The defendant had not as yet (*Easter Term*) been charged in execution. A summons to discharge the prisoner was on the 10th *April*, attended before *Gurney, B.*, who held that the case was not within the 85th rule of *Hilary Term, 2 Will. 4*.

The plaintiff had obtained a verdict against the defendant in *Trinity Vacation, 1837*, and on the 29th *December* in the same year, had proceeded against the bail; on the last day of *Michaelmas Vacation, 1838*, the defendant rendered in discharge of his bail:—*Held*, that not having been charged in execution before the expiration of *Hilary Term* he was entitled to be discharged out of custody by *supersedas*.

Peacock shewed cause, and contended that the 85th rule of *Hilary Term, 2 Will. 4*, applied only to a case where the defendant was in custody at the time of the trial, or where he had surrendered at the time of trial. That in the present case, where the defendant had not rendered until the day preceding *Hilary Term*, the plaintiff had the whole of *Hilary* and *Easter Terms*, in which to charge him in execution.—[*Parke, B.*—The 85th rule of *Hilary Term, 2 W. 4*, does not apply to the present case which must be decided

The 85th rule of *Hil. T. 2 Will. 4*, does not apply to such a case.

(a) "The plaintiff shall proceed to trial or final judgment against a prisoner within three terms, inclusive, after declaration, and shall cause the defendant to be charged in execution within

two terms inclusive after such trial or judgment, of which the term in or after which the trial was had, shall be reckoned one."

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under an old rule of this court, *R. T. 26 & 27 Geo. 2, sec. 11 (b)*. The only question is, whether *Michaelmas Vacation*, can, for the purposes of this case, be considered as a Term. The officer of the court refers us to *Borer v. Baker (c)*.—On that authority, we think that within the meaning this rule *Michaelmas Vacation* constituted one term, and *Hilary Term* another.]—*Peacock* then contended that the plaintiff had received no proper notice of the defendant's render.

Ball.—The defendant states in his affidavit, that he has rendereo; that implies that the render is in all respects correct.

Per Curiam.—This rule must be made absolute.

(b) "In case of a surrender in discharge of bail, after final judgment obtained, unless the plaintiff shall proceed to cause the defendant to be charged in execution upon the said judgment, within two terms next after such surrender, and due notice thereof, (of which two terms, the term wherein the surrender was made shall be taken to be one), in case no writ of error, &c., the prisoner shall be discharged out of custody by *supersedeas*, unless, upon notice given

to the plaintiff's attorney, or clerk in Court, good cause shall be shown in either of the said cases to the contrary." See 1 Tidd Pr. 363, 9th edit.

(c) 2 Dowl. P. C. 608. This case decides that "If a trial takes place in vacation and the defendant surrenders after it, and before the following term, he ought to be charged in execution in that term, or he will be *supersedeable* under 1 Reg. Gen. H. T. *Will.* 4, r. 85.

April 21.

MORRELL and others v. FRITH.

Messrs. M. the plaintiffs, applied by their agent to the defendant for a settlement of their account; to which the defendant wrote the following answer: "Since the receipt of your letter, and indeed for some time previously, I have been almost in daily expectation of being enabled to give a satisfactory reply to your first application, respecting the demands of Messrs. M. on me. I propose being in Oxford to-morrow morning, when I will call upon you on these matters." Held, that this was not a sufficient acknowledgment to take the case out of the Statute of Limitations, and that the meaning of the letter was a question of law, to be determined by the judge in the first instance.

ASSUMPSIT for money paid, and on an account stated. *Pleas* · *Non assumpsit*, and the Statute of Limitations. The plaintiffs were bankers at Oxford, and this action was brought to recover advances made by them to the defendant. At the trial before Gurney, B., at the Oxford Spring Assizes in 1838, it appeared that an agent of the plaintiffs had written to the defendant, requesting him to settle the plaintiffs' account. To this application the defendant returned the following answer by letter—"Since the receipt of your letter, and indeed for some time previously, I have been almost in daily expectation of being enabled to give a satisfactory reply to your first application, respecting the demands of Messrs. Morrell on me. I propose being in Oxford to-morrow morning, when I will call upon you on these matters." The plaintiffs contended at the trial, that this letter contained an acknowledgment sufficient to take the case out of the Statute of Limitations, and that that question ought to have been submitted to the jury. The learned judge being of opinion, that the letter did not contain a sufficient acknowledgment of the debt, refused to leave the point to the jury, and the plaintiffs were nonsuited, with leave to move to set aside the nonsuit, and enter a verdict for such sum as the court should direct.

Ludlow, Serjt., now moved accordingly. The defendant's letter contains a sufficient acknowledgment of the debt. But if its meaning be ambiguous, the jury should have been called upon to say whether or not it amounted to an

acknowledgment. *Lloyd v. Maund* (a), *Rucker v. Hannay* (b), *Frost v. Bengough* (c).—[Alderson, B.—The stat. 9 G. 4, c. 14, recites, that it is expedient to prevent questions as to the effect of acknowledgments offered in evidence for the purpose of taking cases out of the Statute of Limitations; such questions will not be prevented, if the alleged acknowledgment is to be submitted to the jury.]—In *Bird v. Gammon* (d), Tindal, C. J. says, "The first objection taken for the defendant is, that it was left to the jury, to say what was the effect of the letter. But by a chain of cases from *Lloyd v. Maund*, to *Frost v. Bengough*, and others, it appears that such has been the constant course."—[Alderson, B.—If the jury had found a verdict for the plaintiffs on the ground that this letter amounted to an acknowledgment, would not this Court have set it aside?—The plaintiffs are bound to contend that this Court would not disturb such a verdict.—[Parke, B.—I have always doubted the correctness of the decision in *Lloyd v. Maund*.]—[Lord Abinger, C. B.—You ought to produce an instance of a letter being left to the jury, which in the opinion of the judge did not raise any acknowledgment of a debt.]—It is contended, that where a letter is equivocal in its terms, it ought to be submitted to the jury.

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LORD ABINGER, C. B.—There is no ground for setting aside this nonsuit. The letter in question contains nothing like an acknowledgment of a debt. The utmost that can be said is, that the defendant has framed it in evasive terms, to avoid making an explicit admission, that the debt is still due. Whether the effect of certain descriptions of evidence, is to be determined by the judge or by the jury, has always been a nice point; and I regret that in modern times, the confusion between questions of law and fact, has very considerably increased. It would be far better if the rules of law with regard to such points, were more definite and more widely known. Where the evidence consists of a series of letters, the whole must be submitted to the jury, and they must form their opinion concerning them. But when the effect of a single letter only is in question, and there are no facts to explain or qualify it, it is safer doctrine to hold, that the meaning of such an instrument is a question of law for the judge. In actions of libel, juries are often called upon to determine the meaning of words; and the reason is, that the meaning forms part of the inquiry as to the intention of the party who has published the libel. But where the written document is clear and unambiguous, the judge must decide upon the effect of it, otherwise the utmost uncertainty would prevail. The result of *Lloyd v. Maund* is this, that the learned judge who tried the cause was, in the opinion of the Court, wrong as to his interpretation of the letter, and that he ought not to have nonsuited the plaintiff, but have submitted the case to the jury. In the case of written instruments like the present, it is the duty of the judge at the trial to state, in the first instance, his own opinion of their meaning. In this case, the letter ought not to have been left to the jury.

PARKE, B.—This nonsuit ought not to be set aside. Where there is an

(a) 2 T. Rep. 760.
(b) 4 East, 604, note.
(c) 8 B. Moore, 180; 1 Bing. 266,
S. C.

(d) 3 Bing. N. C. 883; 3 Hodg. C.
P. Trin. T. 1837, S. C.

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acknowledgment of a debt, there must be a promise to pay, either express or implied. An acknowledgment of itself, imports such a promise, because it will be understood that a man who admits the existence of a debt, engages to pay it. But here there is no acknowledgment of a debt *simpliciter*, nor is there any express promise to pay. The meaning of the defendant's letter is, that he neither denies the debt, nor promises to pay. Such a letter does not take the case out of the Statute of Limitations. Then as to the duty of the judge to submit the letter in question to the jury. The authority of *Lloyd v. Maund*, is relied on by the plaintiffs. I have always disapproved of the doctrine there laid down. My practice in similar cases has been, to state to the jury my opinion of the meaning of the document, and also to ascertain theirs; so that, if they thought differently from me, the opinion of the Court above might be taken on the point. If I were called upon to give an opinion upon *Lloyd v. Maund*, I should say, that that case was not law.

BOLLAND, B., concurred.

ALDERSON, B.—In this case, there is no acknowledgment sufficient to take the case out of the Statute of Limitations. When the instrument resembles that in *Lloyd v. Maund*, and there is no other evidence relating to it, the question is then for the consideration of the Court, and not of the jury. Where the meaning of the words is in issue, as where mercantile phrases are used which require explanation by mercantile men, the jury are to determine that meaning. They are to do so in the same way, that they decide upon the correctness of a translation from a foreign language.

Rule refused.

April 24.

MILEHAM v. EICKE.

The plaintiff gave a written authority to the defendant, his solicitor, to sell the life interest which the plaintiff's wife had in certain stock, standing in the name of trustees to her former marriage settlement, and out of the proceeds to pay to W. C. E. the sum of 169*l*.

The plaintiff also directed the defendant to prepare a settlement of other property belonging to the plaintiff, with power to dispose of it in a certain specified manner. The defendant and others were to be trustees. The defendant had applied 169*l*. in the manner directed by the plaintiff, and had also disposed of other sums. The plaintiff having been nonsuited in an action for money had and received, brought against the defendant for the balance of money remaining in his hands. The Court held, *first*, that the proceeds of the property, which was originally trust property, did not constitute money had and received to the use of the plaintiff; *secondly*, that the defendant was trustee of the proceeds, and they refused to set aside the nonsuit.

ASSUMPSIT for money had and received. *Plea*:—*Non assumpsit*. On the 27th March, 1837, the plaintiff and his wife wrote the following letter to the defendant, who acted as their solicitor:—

"We do hereby request and authorize you to sell the life interest of the undersigned *Ann Maria Mileham*, late *Finlayson*, formerly *Pinnock*, spinster, in and to the sum of *l. 3½* per cent consols, standing in the name of the trustees, in the deed of settlement, made on the marriage of the said *Ann Maria Mileham* with *Leslie Finlayson*, at not less than 450*l*.; and out of the proceeds, we authorize you to pay to *W. C. Brandram*, the sum of 169*l*., as a consideration for the transfer or assignment of the mortgage, to him, from the same *L. F.*, the same transfer to be made to the undersigned *W. Mileham*. And you are also to prepare a settlement of the proceeds and

income arising from the New *London Price Current*, upon the same terms as contained in the draft or intended will of the said *L. F.*, and also of the said reversionary or life interest of the said *Ann M. M.*, and of the said *W. M.*, and the settlement made upon the marriage of his father and mother; the interest of the said monies, when received, to be for wife for life, remainder to *W. M.* for his life (if survivor), and reversion to all the children of the said *A. M. M.*; you will also insert a covenant, that *W. M.* shall insure his life in 2000*l.*, in one or more policies, the same to be assigned in trust for the benefit of Mrs. *M.*, or as she shall direct by her will; the trustees to be yourself, *T. S.*, of *S.*, & *H. H.*, of *B.*

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Signed "*W. Mileham.*
A. M. Mileham."

The defendant had sold the stock in question, and had paid the sum of 169*l.*, pursuant to his instructions, together with other sums. This action was brought to recover the balance remaining in his hands. At the trial, before *Gurney, B.*, at the Sittings after *Hilary Term*, 1838, the plaintiff was nonsuited.

Petersdorff moved for a rule, calling on the defendant to shew cause why the nonsuit should not be set aside;—The damages to be referred to an arbitrator, if the rule should be made absolute. The defendant contended at the trial, that the plaintiff could not maintain the action for money had and received, as the property was trust property. But when the stock was converted into money, the proceeds belonged to the husband.—[*Parke, B.*—This property was in trust, the husband would therefore hold it for the purposes of the trust.]—[*Alderson, B.*—How can the defendant be said to have received this property to the use of the husband?—[*Parke, B.*—The defendant would be treated in a Court of Equity as a trustee.]—The defendant has permitted an appropriation of part of this money.—[*Parke, B.*—He may then be liable for a breach of trust.]—The letter of the plaintiff and his wife may amount to nothing more than an authority to the defendant to take the proceeds of this property.—[*Alderson, B.*—The defendant takes this trust property, only for the purpose of putting it into another course.

Per Curiam.—The Court cannot grant a rule.

Rule refused.

SHACKELL v. RANGER.

April 24.

PLATT moved for a rule, calling upon the plaintiff to shew cause why a verdict obtained by him, together with the notice of trial, and all subsequent proceedings, should not be set aside for irregularity. The action was

The plaintiff took issue on a special plea of the defendant, and adding a similitur

without a date, delivered the issue within the four days of rejoining, the defendant not being bound to rejoin gratis. A motion having been made to set aside the verdict, notice of trial, and subsequent proceedings, on the ground that the similitur was not dated; the Court refused the rule. *Semble*, the want of date to a similitur is no ground for setting aside the issue.

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brought on two promissory notes; the defendant pleaded a special plea. The plaintiff took issue on the plea, and instead of waiting for the expiration of four days, added the similiter, and delivered the issue without dating the similiter. The defendant was not under terms of rejoining gratis. The commission day of *Gloucester*, where the venue was laid, was on the 31st *March*. The issue was delivered on the 19th *March*, and was immediately returned by the defendant, who said it was irregular and informal. By the 1st rule of *Reg. Gen., Hil. T., 4 W. 4*, it is ordered that "Every pleading, as well as the declaration, shall be entitled of the day of the month and year when the same was pleaded, and shall bear no other time or date, and every declaration and other pleading shall also be entered on the record made up for trial, and on the judgment roll under the date of the day of the month and year when the same respectively took place, and without reference to any other time or date, unless otherwise specially ordered by the Court or a Judge." The similiter is a pleading, and ought to be dated. *Worthington v. Wigley* (a) shews that a new trial will be granted, if the issue does not contain the dates of the pleadings.—[Lord Abinger, C. B.—I was asked to set aside the issue, and refused to do so. My opinion was, that the principal object of dating pleadings was, to give the antagonist notice of the time of their delivery.]—The defendant was not bound to rejoin gratis, and therefore had four days to add the similiter. The plaintiff's object was to avoid being too late in his notice of trial.—[Parke, B.—A plaintiff may add the similiter, and give notice of trial, before the four days to rejoin have expired.]

Rule refused (b).

(a) 5 Dowl. P. C. 209; 3 Scott, 555,
 S. C.

(b) See 2 Tidd Pr. p. 718, 9th edit.
 and Tidd's App. 250, s. 39.

May 4.

EDWARDS v. HANCORNE.

It is a sufficient ground for a distringas, that at the first time of calling, a written paper, appointing two other days of calling, and accompanied by a verbal appointment of one of the same days, has been left at the house of the defendant, and has been received by him.

ARNOLD moved for a distringas.—There had been three calls at the dwelling house of the defendant. On the first call, the plaintiff left a written paper for the defendant, in which he made two appointments, informing the person to whom he delivered the paper that he would call again on one of the days appointed. He was afterwards told by the defendant's wife, that her husband had received the written paper.

Per Curiam, That is sufficient.

Rule granted.

COOPER v. MORECROFT.

Eschequer.

DEBT for money lent, and money due upon an account stated. *Plea:* as to all but 5*l.* *nunquam indebitatus*; and as to 5*l.* a set-off for work and labour, money paid, and money due upon an account stated. The plaintiff by his particulars claimed the sum of 5*l.*

Payment cannot be given in evidence under a plea of set-off for money paid.

At the trial before the under-sheriff of *Middlesex*, the defendant offered evidence that money had been paid by him to the plaintiff, on account of the debt. It was objected that the evidence was not admissible under the plea of set-off, nor could it be received in reduction of damages, and *Belbin v. Butt (a)* was referred to. The objection was, however, overruled, and the defendant obtained a verdict.

Busby having obtained a rule for a new trial,

Hughes shewed cause, and contended that the evidence was admissible under the set-off for money paid.

Per Curiam.—A set-off implies a cross action, consequently payment cannot be given in evidence under that plea.

Rule absolute.

(a) 1 M. & H. 70; 4 Dow. P. C.; 2 M. & W. 422.

ROBSON v. ROWLAND.

THIS was an action for money had and received. *R. V. Richards* had obtained a rule calling on the plaintiff to state in writing whether this action was brought to recover the deposit paid by him to the defendant, upon the purchase of certain premises, and if so, why the plaintiff should not deliver particulars in writing containing his objections to the title.

In an action to recover the deposit upon the purchase of an estate, the defendant is entitled to be furnished with particulars of the objections to the title arising from matters of fact, but not those which are matters of law.

Jervis shewed cause, and objected that the application was too late. The action was commenced on the 1st *December*, 1837. On the 6th *February*, 1838, a declaration was delivered, to which the defendant had pleaded, and the present rule was moved for on the 20th *April*.

R. V. Richards, contra.—An abstract of title has been delivered by the defendant, and all objections to it removed.

PARKE, B.—On the authority of *Squire v. Todd (a)* and *Callett v. Thompson (b)*, the defendant should be furnished with the particulars asked for; and the plaintiff must state all his objections to the title, arising from matters of fact, but not those which are matters of law.

Rule absolute.

(a) 1 Camp. 293.

(b) 3 B. & P. 246.

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The defendant does not plead that the debt is still existing; therefore we cannot presume that it is so, but have a right to infer that it has been satisfied.

ALDERSON and GURNEY, Bs., concurred.

Judgment for the plaintiff.

WEBB v. FAIRMANER.

The time of credit given upon a mercantile contract must be reckoned exclusively of the day on which the contract was entered into.

THIS was an action for goods sold and delivered. At the trial before Gurney, B., it appeared that the goods were sold to the defendant on the 5th *October*, to be paid for in two months. On the 5th *December* the present action was commenced. A verdict having been found for the plaintiff,

R. F. Richards obtained a rule to set it aside, on the ground that the action had been commenced before the credit had expired.

Platt and *Mansel* shewed cause.—It is submitted that the day of sale must be taken as one of the days, and as payment might be insisted upon on the first moment of the 5th *December*, the cause of action was complete on that day. The rule is, that if the computation is to be made from a particular day, that day is to be excluded, but if from a particular fact, the day on which the fact occurred is included. In *Clayton's* case (a) a lease for three years from henceforth (that is from the delivery) was held to mean inclusively of the day on which the delivery was made. So in *The King v. Adderley* (b), the question was as to the liability of the sheriff to return a writ after the expiration of his office, and it was held that the day on which he left office was to be reckoned as part of the six months within which he was liable to make the return. Under the 21 *Jac.* 1, c. 19, s. 2, which enacts that a trader lying in prison two months after an arrest for debt shall be adjudged a bankrupt, it has been held that the day of arrest is to be included, *Glassington v. Rawlins* (c). So where the law requires a month's notice of an action to be given, the month begins with and includes the day on which the notice was served, *Castle v. Burditt* (d). In *Clarke v. Dazey* (e) a distress was made on the 6th *June*, and the action was not commenced until the 6th *December*, and it was doubted whether it was brought within six calendar months after the act committed, as required by the 8th section of 24 *Geo.* 2, c. 44.—[*Parke*, B.—Suppose goods were sold on the 5th, at one day's credit, could you sue upon the 6th.]-If a man were sentenced to imprisonment for one day he could not be detained there for any portion of the day following.—[*Alderson*, B.—There, in favour of liberty, the fraction of a day is included, but as the law will not in general notice the fraction of a

(a) 5 Rep. 1.

(b) 2 Doug. 463.

(c) 3 East, 407.

(d) 3 T. R. 623.

(e) 4 Moore, 465.

day, the credit must be given either for more or less than a day, and surely the construction should be most strict against the party who is to give credit.]—[*Bolland, B.*—In the case of a bill of exchange, payable at sight, you add three days of grace, and cannot sue until the day next following.]—No rule can be drawn from the case of negotiable instruments, as they are governed by the custom of merchants.

Eschequer.

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R. F. Richards, contrd.—It is singular that no case is to be found respecting the computation of time in mercantile contracts, except on bills of exchange and promissory notes. So far as that analogy goes it is in favour of defendant. All the earlier cases are collected and commented upon in *Lester v. Garland (f)*, but it is difficult to deduce any correct rule from them. Some of the later cases are directly at variance with these quoted on the other side. Thus in *The King v. the Justices of Cumberland (g)*, it was held that the 13 Geo. 2, c. 18, s. 5, requiring six days' notice to a magistrate of an intention to apply for a *certiorari*, was not complied with by a notice given on the 20th to apply on the 25th of the same month. So in *Pellew v. The Inhabitants of Worsford (h)*, it was decided that the two days allowed by the 9 Geo. 1, c. 22, for giving notice of an offence against it, are exclusive of the day on which the offence itself was committed. *Hardy v. Ryle (i)* is at direct variance with *Clarke v. Davey*. In *Watson v. Pears (k)* a patent, dated 10th May, contained a proviso that a specification should be enrolled within one calendar month next and immediately after the date thereof. The specification was enrolled on the 10th of June following, and it was held that the month did not begin to run until the day after the date of the patent.

PARKE, B.—I think the rule should be absolute for a new trial. As to whether a lunar or a calendar month was intended, that question is not now open, since at the trial both parties argued the case upon the ground that the credit was given for two calendar months. Then, assuming that to be so, I am of opinion that the action is prematurely brought. Whatever doubt may have before existed, the case of *Lester v. Garland* seems to have settled the principle, namely, that the day on which the contract was entered into ought to be excluded. In that case a very elaborate judgment was delivered by Sir W. Grant, and an extremely sound rule laid down, nor are we compelled to break in upon that rule in attempting to reconcile many of the older cases. *The King v. Adderley* appears to have been decided upon the ground that the statute ought be construed in favour of the sheriff; and *Clarke v. Davey* was decided on the supposed authority of the former case, without advertent to the fact that it was determined in favour of a public officer, and not on any broad and general principle. Then, in *Glassington v. Rawlins*, the bankrupt undoubtedly lay in prison for the fraction of a day, and it would be difficult that a different construction is to be put upon an imprisonment which becomes an act of bankruptcy and an imprisonment under a sentence. If we look at the cases since *Lester v. Garland* we shall find they are all authorities for excluding the first day. In *Pellew v. The Inhabit-*

(f) 15 Ves. 248.
 (g) 4 N. & M. 378.
 (h) 9 B. & C. 134.

(i) 9 B. & C. 603.
 (k) 2 Camp. 294.

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ants of Wonford, Lord Tenterden laid down a very reasonable mode of determining the computation, that is, to reduce the whole period to one day. If that be done in the present case, it would be impossible to maintain that the other party had not the whole of the following day to pay the stipulated amount; and if this be true of one day, it is equally true of any number of days. Then, if the credit were given for two calendar months, the defendant had the whole of the 5th *December* to pay the money. Though I admit that the rule on bills of exchange is not conclusive, because they are regulated by the law of merchants, yet the analogy, as far as it goes, is in favour of that construction.

BOLLAND, B.—The most convenient rule is to exclude the day of sale. The seller, generally speaking, has the whole of that day to deliver the goods, and as they are, during that period, useless to the purchaser, it is but fair to throw that day out of the calculation of his time of credit. If a party purchases goods on the 1st of *January*, to be paid for by a bill at one month's date, the bill would not be due until the 4th of *February*, consequently, in every case in which the payment is by a bill, the purchaser has the benefit of the day on which the contract was made.

ALDERSON, B.—I think the rule laid down by Lord *Tenterden* affords a very excellent criterion, that is, to reduce the time in question to one day, and see if an absurdity follows unless that day be excluded. It will then appear that the day of credit is to be excluded in all cases.

Rule absolute.

REECE v. WALTERS.

In trespass, where the question is as to the right to the possession of a certain close, the party who demised it to the defendant is a competent witness for him. *T. W.* held certain land, under a lease for lives, granted by *W.* At the expiration of the term *T. W.* obtained the lease from *J.*, a stranger, and delivered it to *W.*, from whose custody it was produced at the trial.—*Held*, sufficient.

THIS was an action of trespass for breaking and entering the plaintiff's close. At the trial, before *Coltman, J.*, at the last Assizes for *Carmarthen*, the question raised by the issue was, whether the plaintiff, or one *T. Walker*, was entitled to the close. In answer to the plaintiff's evidence of possession, the defence set up was, that the close was part of a farm, which in the year 1776 had been leased by one *Williams*, for three lives, to *Walker*, who had occupied it and paid the rent reserved for some years prior to 1836, when the lease expired. At that time the farm was re-let by *Williams* to *Walker*, the plaintiff then being in possession of the *locus in quo*; and *Walker* under-let that portion to the defendant. The lease of 1744 was produced, and it was stated that *Walker* had obtained it, on the day after the last life dropped, from two persons of the names of *Williams* and *Jones*. He afterwards took it to *Williams*, the lessor, and left it in his hands, receiving from him a fresh lease. It was objected; *First*, that *Walker* was not a competent witness to prove the defendant's right to the close; and, *Secondly* that the lease of 1774 was not shewn to have come from the proper custody. Both objections were overruled, and a verdict was found for the defendant.

Evans moved to set aside the verdict, and for a new trial.—*First*, the evidence of *Walker* was inadmissible. He was clearly interested in the event of the suit, since, if the defendant succeeded, he would be entitled to the rent.

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It has been held, that a landlord may give evidence in an action between *A.* and *B.*, when both are his tenants; but if they are to pay in different rights, his evidence is inadmissible, *Fox v. Swan* (a), *Bell v. Harwood* (b).—[*Parke, B.*—Without you can shew that the verdict in this action would be evidence for or against the witness, he is competent.]—In *Doe, d. Lord Teynham v. Tyler* (c), it was held, that a remainder-man, after a tenant in tail, is not a competent witness for the tenant in tail in ejectment for the entailed property.—[*Parke, B.*—There the effect of the evidence would be to put the tenant in tail in possession, and his seisin is the seisin of the remainder-man.]—A landlord, in ejectment, is not a competent witness to support the right of his tenant.—[*Lord Abinger.*—The reason is, because there the question is one of possession, and as the possession of the tenant is that of the landlord, he himself would be dispossessed if the verdict went against the tenant.]—[*Parke, B.*—The short answer to the objection on this ground is, that the result of this action can in no way affect the landlord.]

Secondly, the lease was not produced from the proper custody. The witness did not obtain possession of it until after his term had expired, and the persons from whom he received it were strangers to all parties.—[*Parke, B.*—Suppose the tenant had obtained the lease during his tenancy, and produced it on the trial, would not that have been enough?—It is conceded it might: but here the custody to which it is traced is insufficient in respect both of the persons and the time when they held it. In order to prevent forgery, it is most important that a strict rule should be adhered to.

LORD ABINGER, C. B.—The witness stated that he had been in possession of the farm for many years, and had during that time paid the precise rent reserved by the indenture. After the lease expired, he got the instrument itself from *Williams* and *Jones*, and took it to the landlord, who thereupon granted a new lease. It is admitted, that if the lease had been in the possession of the witness during the tenancy, that would have been enough, and it appears to me, that the persons from whom he obtained it recognized his right to the possession of it, and by inference acknowledged that they held it on his account.

PARKE, B.—I think there was evidence that this lease was produced from the proper custody. The instrument was obtained from *Williams* and *Jones*, who, by the act of giving it up to him, must be presumed to have held it on his account. Then the circumstance of the rent paid by *Walker* being the same as that reserved by the lease, is a strong fact to connect him with the lease. From him it passed to the landlord, and the lawful possession of the instrument was in this way continued. I think that this is a question to be decided by the judge, and not the jury, and I see no reason to differ from him.

ALDERSON, B.—There should be satisfactory evidence of the instrument being produced from the proper custody, which I think there was in this case.

Rule refused.

(a) *Styles*. 482.

(l) 3 *T. R.* 308.

(c) 6 *Bing.* 330

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BALL v. BLACKWOCK.

In proceedings against the sheriff arising out of an action by indorsee against acceptor of a bill of exchange, where there is also an action against the drawer, the sheriff will be entitled to a stay of proceedings upon payment of the debt and costs in the action against the acceptor only.

AN order had been made by *Gurney, B.*, for a stay of proceedings against the sheriff, on payment by him of the debt and costs in an action by the indorsee against the acceptor of a bill of exchange. An action had also been commenced against the drawer of the same bill.

Richards now moved to rescind the order, and for the Master to tax the plaintiff's costs in the action against the drawer, as well as in the action against the acceptor.—The sheriff had been guilty of negligence in not arresting the defendant, and therefore ought not to be in a better situation than the acceptor of the bill, who could only obtain a stay of proceedings upon payment of the debt and costs in the actions against the other parties (*a*). Before the case of *The King v. The Sheriffs of London* (*b*), the sheriff was considered liable to pay the costs of the other parties; that case, however, established the contrary practice.

Fuller v. Prest (*c*) and *The King v. The Sheriffs of London* (*d*) were also referred to.

PARKE, B.—It is difficult to see upon what principle the sheriff has been made to pay the costs of the other parties; if he pays the amount of the bill and the costs in the action against himself, the plaintiff cannot be in a worse situation than if he received the amount of the debt and costs from the acceptor. The case in 2 *Bing.* is an authority that all the sheriff is liable to pay, is the amount which the acceptor would be bound to pay in the action against him, and not that which he might be called upon to pay if applying to the Court for indulgence.

Rule refused.

(*a*) See the Rule of T. T. 1 Vic., by which the acceptor of a bill or maker of a note is ~~not~~ at liberty to stay proceedings on payment of the debt and costs in that action only.

(*b*) 5 B. & A. 192.
(*c*) 7 T. R. 109.
(*d*) 2 *Bing.* 227.

PUGH v. ROBERTS.

Trespass for breaking and entering the plaintiff's dwelling-house and stable, and assaulting the plaintiff. *Pleas*: First, not guilty. Secondly, that the dwelling-house was not the plaintiff's. Verdict for the plaintiff, damages one farthing.—*Held*, that the plaintiff was entitled to full costs.

TRESPASS for breaking and entering the plaintiff's dwelling-house and stable, and assaulting the plaintiff. *Pleas*:—*First*, not guilty; *Secondly*, as to breaking and entering the dwelling-house and stable, that they were not, nor was either of them, at the said time when, &c., the dwelling-house and stable of the plaintiff. The plaintiff obtained a verdict on both issues, damages, one farthing. The Master, on taxation, having allowed the plaintiff no more costs than damages,

Jervis obtained a rule nisi for the Master to tax the plaintiff in full costs.

N. Clarke shewed cause.—The plaintiff is entitled to no more costs than damages. Before the new rules, if Not Guilty had been pleaded alone, the plaintiff must have had a certificate under the 22 & 23 *Car.* 2, c, 9, s. 136, or order to obtain full costs. The two pleas on the record amount to the old plea of the general issue. The “freehold or title” is not in issue upon these pleadings.

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PARKE, B.—The question is, whether the plea denying the house and stable to be the plaintiff's, does not necessarily put the title in issue. We have so decided in *Purnell v. Young*. Must it not then bring the title in question so as to prevent the operation of the statute of *Charles*? It only shews the folly of putting such a plea upon the record in such cases.

Rule absolute.

JONES v. SHIEL.

BAYLEY moved for a rule to compute principal and interest on a promissory note. The action was brought to recover 216*l.* 14*s.*; and the declaration contained counts for goods sold and delivered, and on the note. The defendant, after declaration, paid 150*l.* on account of the action, leaving a balance due, which was less than the amount of the note, and interlocutory judgment was signed for the residue. The plaintiff had obtained a rule to compute, but the Master had refused, on the ground that under the circumstances there must be a writ of enquiry. It was submitted, that at all events the plaintiff had a right to apply the 150*l.* to the count for goods sold.—[*Parke, B.*—Assuming that you are right, there must at least be nominal damages upon the count for goods sold.]—He may enter a remittitur as to the damages on that count.—[*Parke, B.*—No, he cannot, because he has received them. If the other side agree that you shall enter a *nolle prosequi* on the count for goods sold, you may then execute your rule to compute; but, as the case now stands, there must be a writ of enquiry.]

Rule refused.

In an action for goods sold, and on a promissory note, the defendant, after declaration, paid a certain sum on account of the action, leaving a balance due less than the amount of the note:—*Held*, that the plaintiff could not have a rule to compute, unless the defendant consented to his entering a *nolle prosequi* as to the count for goods sold.

LUMLEY v. HEMPSON.

PLATT had obtained a rule calling on the plaintiff's attorney to shew cause why all proceedings in this case should not be set aside. Nothing had been done in the cause since *Easter Term, 1836*.

The rule requiring a term's notice, where no step has been taken for four terms, does not apply to a motion to set aside proceedings.

Chilton shewed cause, and objected that as more than four Terms had intervened, no other step could now be taken without a Term's notice.—[*Parke, B.*—Will that rule apply to an application to set aside proceedings? This is not a step in the progress of the cause, but an application to stop it.]—The rule of the *Common Pleas E. T.* 13 *Geo.* 2, cited in *May v.*

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Wooding (a), orders, "that in all cases in which there have been no proceedings for four Terms, &c., the party who desires to proceed again shall give a Term's notice to the other of such proceedings. In *Tipton v. Meek (b)*, where the plaintiff obtained a rule for a new trial, but neglected to carry down the cause for more than four Terms, the Court would not discharge the rule on motion, a Term's notice of such motion not having been previously given.

PARKE, B.—The rule requiring a Term's notice, where no step has been taken for more than four Terms, does not apply here. The plaintiff does not seek to take a proceeding to judgment, but says the past proceedings are entirely wrong, and applies to the equitable jurisdiction of the Court to set them aside. The object of the rule requiring a Term's notice is, that one party may be forewarned of an intention which the other may entertain to take a step in some proceedings to judgment, which have been suspended for four Terms.

The rule was subsequently discharged upon another ground.

(a) 3 M. & S. 500.

(b) 8 Moore, 579.

PINNOCK and Another, Assignees of BEAN, a Bankrupt, v. HARRISON.

A set-off is no answer to an alien, unless there be a specific agreement between the parties that the one debt shall be set off against the other.

TROVER for iron work, and conversion before the bankruptcy. *Plea:* First, not guilty; Secondly, that before and at the said time when, &c., the defendant was a coach-body maker, and the trade and business of a coach body maker used, exercised, and carried on, and that before the said *Bean* became bankrupt, to wit, on, &c., the said goods and chattels were delivered by *Bean* to the defendant, for the purpose of being wrought and repaired by the defendant in the way of his said trade, for the said *Bean*, and at his request for reasonable reward: that he, the defendant, received the said goods and chattels under and by virtue of the said delivery, and for the purpose aforesaid, and on the terms aforesaid, and did bestow his work and labour upon and did work and repair the said goods in pursuance of the purpose of the said delivery, and that he reasonably deserved to have in respect of such work and labour the sum of 8*l.*, of which *Bean* had notice, and then became indebted to him in the said sum of money: wherefore and because the said sum of 8*l.* was and continued to be wholly unpaid and unsatisfied, and was not at any time tendered to the defendant, he, the defendant, did detain and still detains the said goods as a security and lien for the said sum of 8*l.*, which was the alleged conversion in the declaration mentioned.

Replication to the second plea, *de injuriâ*.

At the trial before Lord Abinger, C. B., at the *Middlesex* Sittings after *Hilary Term*, it appeared that the iron-work for which the action was brought, was sent by *Bean* to the defendant to have wood work affixed to it as part of a carriage, and before it was finished the defendant bought of *Bean* a tilbury for 18*l.* 18*s.*, paying 7*l.* on account, which, together with a balance of 2*l.* 11*s.*

6d. in his favour upon former dealings, reduced the price to 9l. 6s. 6d. Repeated applications had been made for the iron work, and the defendant had promised to send it home on a certain day, whether finished or unfinished, and to settle the account at that time. This, however, he failed to do. The work done by him was proved to be of the value of 8l. only. On the part of the plaintiff it was contended, first, that under these circumstances no lien could arise; and secondly, that if it did it was waived by the defendant's promise to return the goods. The learned judge overruled both objections, and a verdict was found for the defendant, leave having been reserved to move to enter a verdict for the plaintiffs.

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Crowder now moved accordingly.—No doubt a tradesman who does work upon certain goods, has a right to the security of those goods; but the case is different where a contract takes place, which shews that it was the intention of the parties that there should be no lien. For instance, where the usage of trade is fifteen months credit, there no lien arises. So here, the agreement to send home the goods on a certain day, and to settle accounts, was, in fact, a special contract between the parties inconsistent with a lien, *Chace v. Westmore (a)*. In this case there was no occasion for a lien, as the defendant had been overpaid for his work.—[*Parke, B.*—The mere right of set-off is not enough to dispense with the lien.]—There is a distinct agreement that the accounts should be settled, and there is a balance due to *Bean*, which is sufficient to destroy the right of lien. It would be so in the case of a general lien, and if not so here, a general lien would not be so advantageous as a special lien.

LORD ABINGER, C. B.—I do not think there is any legal answer to the defence, either on the ground of a counter claim to a larger amount, or on that of a waiver of the lien. A set-off cannot be considered as destroying a lien, unless it be so agreed upon between the parties. As to the other point, I think there was no binding agreement to settle the account.

PARKE, B.—I also think no rule ought to be granted. With respect to the plea of lien, although it is an essential part of it that the debt upon which it is claimed was due and unsatisfied, yet the plaintiffs might have shewn under the general form of replication that it had been paid and satisfied, which they have failed to do by merely shewing a set-off. I am clearly of opinion that the existence of a set-off is no answer to a lien, unless both parties agree that the one shall be set-off against the other, which is equivalent to a payment. If it had been proved that after the work was done it was agreed that the defendant should satisfy himself out of the claim which *Bean* had against him, that would have been an answer to the plea. But here there was nothing to prevent the defendant from suing for the value of the work done by him; the set-off, therefore, cannot be treated as a payment so as to extinguish the debt. Then it is said, that the agreement to return the work on a certain day was inconsistent with a lien at that time. If there had been any binding and final agreement between the parties, I do not know that I should have

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dissented from that proposition ; but it is clear that there was no binding agreement, or anything more than a negotiation to that effect.

BOLLAND, B.—I entertain the same opinion, and the judgment of Lord *Ellenborough* in *Chace v. Westmore* strongly supports it.

ALDERSON, B.—A mere right of set-off cannot be an answer to a lien, unless there be an agreement to that effect, or if the parties have agreed that the work done shall be satisfied in a particular manner, and out of a particular fund, then the lien is gone. Here there is no such agreement. Unless there be a specific agreement, it would be unreasonable that the defendant should lose the benefit of his security.

Rule refused.

SPARROW v. JOHNS.

A., an attorney, had done business for the plaintiff, which did not contain any taxable item. He had also paid 15*l.* 15*s.* as the costs of discontinuing an action, but he swore that he had never made, nor intended to make any charge in respect of that suit: the court refused to compel him to deliver a signed bill in pursuance of the 3 Jac. 1, c. 7, and 2 Geo. 2, c. 23.

Quære, if such a payment be a taxable item.

PLATT had obtained a rule calling upon Mr. *Armstrong*, the plaintiff's late attorney in this suit, to shew cause why he should not deliver to the plaintiff a true bill subscribed with his own hand and name, of all fees, charges, and disbursements in all matters in which he had been concerned for the plaintiff, and why he should not give credit for all sums received. It appeared that after the above action had been commenced the plaintiff had discontinued, and that *Armstrong* had paid 15*l.* 15*s.* as the costs of that discontinuance.

Kelly shewed cause upon an affidavit which stated that *Armstrong* was the brother-in-law of the plaintiff, and that he had acted throughout the suit for her without fee or reward. He had also done other business for her, which did not contain any taxable items. Some family quarrels having arisen, this application was made for the purpose of introducing a taxable item, that the whole account running through several years might be submitted to taxation.—[Lord *Abinger*, C. B.—A summons for this purpose was attended before me at chambers and dismissed, as *Armstrong* distinctly swore that he never charged any costs in this business, or intended so to do.]—He admits that he did not insert this item in his account, in order that he might not be compelled to have the whole taxed. If he were to bring an action to recover this item, his affidavit, in which he distinctly swears that he never made any charge in respect of it, or intended so to do, would be a sufficient answer. It is clear that the Statute does not require the delivery of a signed bill where there is no taxable item. *Arch. Prac.* vol. 1, p. 50.

Platt and *Hindmarch* in support of the rule.—The Court will order a bill to be delivered in this case, in pursuance of the power which it exercises over its officers. The 3 Jac. 1, c. 7, & 2 Geo. 2, c. 23, are equally imperative in requiring an attorney to deliver a bill of costs, whether twenty or only one taxable item appears in it.—[Lord *Abinger*, C. B.—Do you mean to contend that he is bound to deliver an account, though he does not mean to charge for

any taxable item?—[*Parke, B.*—The object of the Statute was, that the client should not have too great a demand made upon him.]—A payment of 15*l.* 15*s.* is made in order to settle the action.—[*Parke, B.*—That was money paid upon a conditional rule. It is very questionable whether that is a taxable item; it is not money paid in the conduct of the case.]—If it be a payment, in the making of which the judgment of the attorney is in any way introduced, it is a taxable item, *Latham v. Hythe* (a). In *Hill v. Humphreys* (b), there was an item for payment of the costs of a discontinuance, and Lord *Eldon* says, “the question does not arise upon payment of money for the defendant’s use, respecting which the plaintiff was not called upon to exercise his skill and knowledge as an attorney, but it arises upon the payment of certain sums, respecting which the plaintiff was called upon as attorney in a cause to exercise his judgment and advise his client.”—[*Alderson, B.*—There Lord *Eldon*’s judgment proceeded upon the ground of there being a taxable item, and that drew all the other items into the bill.]—This is evidently money paid for the benefit of the client, *Miller v. Towers* (c).—[*Alderson, B.* So is money paid for conveyancing, yet that is not a taxable item.]—In *Crowder v. Shee* (d), money paid by an attorney for costs, which the client was adjudged to pay, was held to be a disbursement within the Statute.

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LORD ABINGER, C. B.—This rule must be discharged. It appears from the affidavit of Mr. *Armstrong* that he has not, nor ever intended to make any claim in respect of this disbursement, and I cannot discover that the Statute requires a bill to be delivered under such circumstances.

PARKE, B.—I am of the same opinion. The object of the Statute is, that the client is not to have too large a demand made upon him; but here the attorney makes no charge whatever. Whether or no this might be a taxable item in a case where the attorney was to be paid for his trouble, I do not give any opinion; but here, where he was conducting the case without fee or reward, it certainly was not.

ALDERSON, B.—In *Prothero v. Thomas* (e), *Gibbs, C. J.*, puts it, that a bill is necessary where the attorney has made disbursements, or is about to sue for compensation for his trouble. I think it very doubtful whether this is a taxable item at all, but, under the circumstances, it certainly is not.

Rule discharged.

(a) 1 C. & M. 128.

(d) 1 Camp. 437.

(b) 2 B. P. 343; 3 Esp. 254.

(e) 6 Taunt. 196.

(c) Peake, 102

WEST v. SMALLWOOD.

TRESPASS for assault and false imprisonment. *Plea*: Not guilty. At the trial before Lord Abinger, C. B., at the *Middlesex* Sittings after *Hilary Term*, it appeared that the plaintiff was a bricklayer, and that he had

Trespass will not lie against a party who lays a complaint before a magistrate

who has a general jurisdiction over the subject matter, and the magistrate thereupon, grants a warrant, under which the party charged is arrested, although the particular case is one in which the magistrate had no authority to act.

The complainant accompanied the constable who had the execution of the warrant and pointed out the plaintiff to him:—*Held*, that this was sufficient evidence to go to the jury of a participation in the arrest.

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been employed by the defendant to build some houses, under a specific agreement. In the course of the work some dispute arose between the plaintiff and the defendant, and the work was in consequence discontinued. The defendant then went before a magistrate and laid an information against the plaintiff under the Master and Servants Act, 4 Geo. 4, c. 34, s. 3. The magistrates having granted a warrant for the apprehension of the plaintiff, the defendant accompanied the constable who had the execution of it, and pointed out the plaintiff to him. The learned judge thought that the action should have been in case, and that the mere act of pointing out the plaintiff to the constable was not sufficient to make the defendant liable in trespass, and the plaintiff's counsel not having pressed his lordship to lay that question before the jury, the plaintiff was nonsuited.

Kelly moved to set aside the nonsuit.—It is conceded that where an information is laid before a magistrate respecting a matter over which he has jurisdiction, and a legal warrant in consequence issues, the only remedy is case; but where the magistrate has no authority to interfere, both he and all the parties who have acted with or under him are liable in trespass. *Moravia v. Sloper* (a) will illustrate the principle. There it was held that when a party pleads a justification under process of an inferior Court, he must shew that the cause of action arose within the jurisdiction of that Court. In *Rafael v. Verelat* (b), it was decided that trespass was maintainable against the defendant who had made a complaint to a sovereign prince in *India*, in consequence of which he imprisoned the plaintiff.—[*Alderson, B.*—In that case Lord Chief Justice *De Grey* says, "I consider the nabob as not being the actor in this case; but the act to be done in point of law by those who procured or commanded it, and in them it doubtless is a trespass."—Lord *Abinger, C. B.*—I do not see how the defendant can be a trespasser; he does no more than lay the facts before the magistrate, who exercises his judgment as to whether he will grant a warrant. This distinguishes it from the case of a sheriff who is put in motion by the party; how does it appear that the party puts the magistrate in motion? he applies to the magistrate having a general jurisdiction over the subject matter, and states his case, and the magistrate acts upon it or not at his discretion.]—In this case, it is clear the magistrate had no jurisdiction. *Hardy v. Ryle* (c) and *Lancaster v. Greaves* (d) are authorities to shew that the Statute only applies to cases in which the relation of master and servant exists. There is another ground upon which the case ought to have been left to the jury, namely, the interference of the defendant in the arrest, by pointing out the plaintiff to the officer. The onus of justifying the arrest lies on the defendant, and the plaintiff may maintain the action without producing the warrant, *Holroyd v. Lancaster* (e), *Elsee v. Smith* (f).

Lord ABINGER, C. B.—Where a magistrate has a general jurisdiction over the subject matter, and a party comes before him and prefers a complaint, upon which the magistrate makes a mistake in supposing it a case in which he is bound to exercise his authority, and grants a warrant, the party

(a) *Willes*, 30.
(b) *W. Black.* 983, 1055.
(c) 9 *B. & C.* 603.

(d) *Id.* 628.
(e) 11 *Moore*, 441; 3 *Bing.* 492.
(f) 1 *D. & R.* 97.

who is taken under that warrant cannot maintain trespass against the complainant, but his only remedy is case. The magistrate who grants a warrant without having any jurisdiction is liable in trespass; but this liability does not extend to the constable acting under the warrant, since he is protected by the 24 Geo. 2, c. 44. With respect to the other part of the case, I do not deny that the fact of the defendant pointing out the plaintiff to the constable might be evidence to go to the jury, but that point was not pressed on the part of the plaintiff.

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BOLLAND, B.—I am of the same opinion. With regard to the case of a sheriff, there the party puts him in motion; but here the complainant merely asks the magistrate how to act, and the latter erroneously thinks that a warrant will lie. As to the subsequent conduct of the defendant, all he does is to point out the plaintiff to the officer, and it does not appear that there was any malice on his part.

ALDERSON, B.—As to the first point, the party must be taken merely to have laid his case before the magistrate, who thereupon grants a warrant. Then, what has been done to make the defendant liable in trespass? It is true that the magistrate has granted a warrant which is not conformable to the Statute, but that does not enable the plaintiff to maintain trespass, though he might recover in case if he could prove a want of probable cause. As to the other point, I agree that if the defendant had taken an active part in apprehending the plaintiff, he could not rest his defence upon the general issue, but must have justified his right so to do. Then comes the question whether, in point of fact, anything was done on the part of the defendant to cause the law to be put in force against the plaintiff. All that the defendant did was to point out the plaintiff to the officer. I agree that that question ought to have been left to the jury; but, since the plaintiff's counsel declined to press the point, I do not see how we can now interfere.

Rule refused.

HOLLINGDALE v. LLOYD.

CLEASBY shewed cause against a rule for delivering up a bail-bond to be cancelled, on the ground that the defendant was a married woman. It appeared that she had been living apart from her husband at *Gravesend*, where she had contracted debts; and that upon being requested to pay, she gave the creditor an order for money upon a tenant, who refused to pay it, the defendant having already drawn upon him to an amount exceeding his rent. The defendant did not appear to have represented herself as a *feme sole*.

Where a married woman has been arrested, and has put in special bail, the Court will order the bail-bond to be delivered up to be cancelled, unless at the time of incurring the debt she represented herself as a *feme sole*.

Per Curiam.—It is an invariable rule that a married woman is entitled to be discharged on common bail, unless she has represented herself as a *feme sole*; the rule will therefore be made

Absolute, without costs (a).

(a) See *Freame v. Mitford*, 1 Cr. & Mee. 54; 3 Tyr. 139.

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CURTEIS v. KENRICK.

A married woman, by her marriage settlement, had power to appoint certain land to uses by her last will and testament "signed and published in the presence of, and attested by three witnesses." She devised all her property, real and personal, but did not refer to the power. The attestation stated the will to be signed, sealed, and delivered by the testatrix in the presence of three subscribing witnesses:—*Held*, that delivery is equivalent to publication of a will, and that this was a due execution of the power.

THIS was a case sent by the Vice Chancellor for the opinion of this Court. By indentures of lease and release, dated on or about the 22d and 23d days of *April*, 1832, the release being made and duly executed between and by *Anne Catherine Wykeham Martin*, since deceased, late the wife of the said *Richard Fiennes Wykeham Martin*, by her then name and description of *Anne Catherine Mascall*, spinster, one of the three surviving daughters and co-heiresses of *Robert Mascall*, Esq., deceased, by *Martha Mascall* his wife, of the first part; the said *Richard Fiennes Wykeham Martin* of the second part; *William Waterman*, Esq., and *Richard Curteis Promfret*, Gent., of the third part; and *Francis James Newman Rogers*, and *Charles Wykeham Martin*, Esq., of the fourth part; being the settlement made previous to the marriage of the said *Richard Fiennes Wykeham Martin* with the said *Anne Catherine Wykeham Martin*, which was afterwards solemnized: in consideration of their intended marriage, she the said *Anne Catherine Wykeham Martin*, with the privity of the said *Richard Fiennes Wykeham Martin*, did grant, bargain, sell, and release the undivided third part or share of the said *Anne Catherine Wykeham Martin* (the whole being divided into three equal parts or shares) of and in the several manors, messuages, farms, lands, and tenements therein particularly described, unto the said *Francis James Newman Rogers* and *Charles Wykeham Martin*, in their actual possession then being, to hold the same to them, their heirs and assigns, to the uses thereafter expressed; (that is to say) after the solemnization of the said then intended marriage, to the use of the said *Francis James Newman Rogers* and *Charles Wykeham Martin*, their heirs and assigns, during the joint lives of the said *Richard Fiennes Wykeham Martin* and *Anne Catherine Wykeham Martin* (without impeachment of waste), upon trust to pay one moiety of the rents and profits thereof, to or for the separate use of her the said *Anne Catherine Wykeham Martin*, and to pay the remaining moiety of the said rents and profits unto the said *Richard Fiennes Wykeham Martin*, or as she should in manner therein mentioned appoint; and after the decease of such one of them the said *Richard Fiennes Wykeham Martin* and *Anne Catherine* his wife, as should first depart this life, to the use of the survivor of them the said *Richard Fiennes Wykeham Martin* and *Anne Catherine* his wife, and his or her assigns during his or her life, without impeachment of waste, with remainder to the use of the said *Francis James Newman Rogers* and *Charles Wykeham Martin*, their heirs and assigns, during the life of such survivors, in trust to preserve contingent remainders, with remainder to the use of the children of the said *Richard Fiennes Wykeham Martin* by the said *Anne Catherine Wykeham Martin*, his wife, for such estates and in such shares and interests as therein mentioned, with remainder in default of such issue, if the said *Anne Catherine Wykeham Martin* should survive the said *Richard Fiennes Wykeham Martin*, to the use of her the said *Anne Catherine Wykeham Martin*, her heirs and assigns for ever; but if the said *Anne Catherine Wykeham Martin* should die in the life-time of the said *Richard Fiennes Wykeham Martin*, then to such uses, upon and for such trusts, intents, and purposes, and with, under, and subject to such powers, provisos, and con-

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ditions as the said *Anne Catherine Wykeham Martin*, notwithstanding her coverture by her last will and testament in writing, or by any codicil or codicils thereto, by her *signed and published in the presence of and attested by three or more credible witnesses*, should direct or appoint; and in default of such direction or appointment, and so far as any such direction or appointment should not extend, to the use of the said *Anne Catherine Wykeham Martin*, her heirs and assigns for ever.

The intended marriage between *Richard Fiennes Wykeham Martin* and *Anne Catherine Mascall*, was duly solemnized; and *Anne Catherine Wykeham Martin*, formerly *Anne Catherine Mascall*, died some time in or about February, 1833, without issue by the said *Richard Fiennes Wykeham Martin*, having first made and published her last will and testament in writing, or a paper writing purporting to be her last will and testament, of the date and in the words and figures following (that is to say):—

“I, *Anne Catherine Wykeham Martin*, do hereby make my last will and testament, and do give and bequeath to my dearly beloved husband, *Richard Fiennes Wykeham Martin*, all the property of which I am possessed, whether real or personal, and also my reversionary interest or interests in any property or properties whatsoever; and I hereby nominate and appoint *Francis Newman Rogers*, Esq. to be my executor. Signed, sealed, and delivered this 3d day of December, 1832, in presence of

“*Anne Catherine Wykeham Martin*.

“*James Whatman*, Surgeon, Maidstone, Kent.

“*Francis Anne Kenrick*, Bowine Place, Kent.

“*Elizabeth Bonham*.”

The question for the opinion of the Court was, whether the testamentary instrument of the 3d day of December, 1832, was a due execution of the power given to *Anne Catherine Wykeham Martin* by her marriage settlement.

The case was argued in *Hilary Term* by

W. H. Watson, for the plaintiff.—The first objection is, that the power was not well executed, the formalities required by the settlement not having been complied with. The will is required to be “signed and published in the presence of and attested by three credible witnesses;” the attestation contains only the words “signed, sealed, and delivered.” There are numerous authorities to shew that the Courts will intend nothing in favour of the execution of a power, *Wright v. Wakeford* (a), *Doe, d. Mansfield v. Peach* (b), *Doe, d. Hotchkiss v. Pearse* (c), *Wright v. Barlow* (d). The question then is, whether “delivery” is of itself equivalent to publication. In *Moodie v. Reid* (e), *Gibbs*, C. J., says, “I do not know what the publication of a will is, I can only suppose it to be that by which a person designates that he means to give effect to a paper as his will.” If mere delivery were enough, how could the witnesses know that it might not have been delivered as a deed, and not as a testamentary instrument. The word “published” is not to be found in the Statute of Frauds, but has been introduced in the case of wills made

(a) 4 Taunt. 213; 17 Ves. 454.

(b) 2 M. & Sel. 576.

(c) 6 Taunt. 402.

(d) 3 M. & Sel. 512.

(e) 7 Taunt. 361; 4 Madd. 566.

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under powers. The question as to what amounts to a "publication," most frequently arises in cases of libel. There it implies the communication of the libellous matter to a third party. So in the case of an award, it is not considered as published until the parties have notice that it is ready for delivery, *Musselbrook v. Donkin* (*f*), *McArthur v. Campbell* (*g*), *Potter v. Newman* (*h*). *Moodie v. Reid* is in favour of the plaintiff. There, stock was limited to such persons as a woman should by her last will, or by any writing or appointment in the nature of a will, to be by her signed and published in the presence of, and attested by two credible witnesses appoint. An appointment by will was thus made:—"These are my last bequests, signed by me this 4th *February*, 1812. *S. M.* Witness, *B. H.* and *J. H.*" The testatrix told both of the witnesses that the paper was her will: it was held, that this was not a good execution of the power. *Ward v. Swift* (*i*) will perhaps be cited on the other side, but that case is not in fact against the plaintiff, for though the will was not declared to be *published*, as required by the power, yet the attestation expressed that it was signed, sealed, and delivered as *her last will and testament*. So in *Doe, d. Spilsbury v. Burdett* (*j*), where there was a declaration in the body of the will that the testatrix "published and declared it to be her last will and testament:" this was held to be a good execution of a power, requiring that a will should be signed, sealed, and published in the presence of, and attested by, three witnesses.—[*Parke, B.*—That case is *sub judice* in the Court of Error.]—In *Stunhope v. Reid* (*k*) the power was to be executed by testament or codicil, signed and published in the presence of, and attested by, three or more credible witnesses; and the will concluded:—"This is my last will and testament, made and signed, &c. in the presence of *A. B.*, &c. Sir *John Leach, V. C.*, said that he could not assume more from the attestation than that the witnesses saw the testatrix sign the will; and he held the execution to be invalid. The same doctrine was established in *Buller v. Birt* (*l*).—[*Parke, B.*—You have not referred to the case of *Lempriere v. Valpy* (*m*), before the present Vice Chancellor.]—There, the power did not require that the witnesses should make any written attestation at all.

Secondly, this being a general devise, did not operate as an appointment in execution of the power. The testatrix devises her property, both real and personal; and there are no words to indicate that she was acting in virtue of the power. In *Denn v. Roake* (*n*) the authorities on this subject were fully considered, and the result is thus stated by *Alexander, C. B.*: "In no instance has a power or authority been considered as executed, unless by some reference to the power or authority, or to the property which was the subject of it, or unless the provision made by the person entrusted with the power would have been ineffectual, or would have had nothing to operate upon, except it were considered as an execution of such power or authority." So in *Lovell v. Knight* (*o*), a devise by a married woman of the whole of her property, both real and personal, was held not to be a good execution of a power to appoint

(*f*) 9 Bing. 605; 2 Scott, 740.

(*g*) 5 B. & Adol. 518; 2 N. & M. 444.

(*h*) 1 Gale, 373; 2 C. M. & R. 742.

(*i*) 1 C. & M. 171.

(*j*) 1 Har. & Woll. 591; 4 A. & E.

1, 6 N. & M. 259.

(*k*) 2 Sim. & Stu. 37.

(*l*) Cited 4 A. & E. 16.

(*m*) 5 Sim. 108.

(*n*) 6 Bing. 475.

(*o*) 3 Sim. 275.

leaseholds and stock by her will.—[*Parks*, B.—There it appeared that there was other property on which the devise could operate. Here, the testatrix being a married woman, it cannot be intended that she had any other property to dispose of than that comprehended in the settlement.]—The Vice Chancellor did not proceed on the ground suggested, but on the principle, that a will passing the general property, could not be deemed an execution of a power, comprising only certain specific property.

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Hodgkin, contra.—With regard to the latter point, the judgment of *Alexander*, C. B., cited from *Denn v. Roake*, affords an answer; for the character of the testatrix as being a married woman, prevents her from disposing of the realty, except under the power. *Lovell v. Knight* is not inconsistent with this conclusion; for in the first place, that case had reference to *personal* estate; and the terms of the will, "the whole of my personal property," were sufficient to pass property, not only then possessed, but subsequently acquired and settled to the separate use of the testatrix; whereas, all powers must be of specific application. *Secondly*, the whole argument in favour of the will being a good execution of the power, proceeded on this, that chattels real might pass as real property. Here, the subject of the devise is real property. The propriety of the decision in *Lovell v. Knight* has been questioned by Sir *E. Sugden* (p), who refers to Lord *Hardwicke's* authority in *Churchill v. Dibden* (q), as sanctioning the doubt. There, a general residuary devise "of all her goods, chattels, and estates undisposed of," was held to pass specific lands included in a power, on the ground that the instrument could not operate as a will, by reason of the coverture.

Then as to the first point, it is submitted that the delivery amounted to a "publication." In *Trimmer v. Jackson* (r), it was held, that the delivery of a will as the testator's *act and deed*, was a sufficient execution of the will under the Statute of Frauds. *Lempriere v. Valpy* is a distinct authority that the signing of a will, and delivery of it to witnesses, in order that they may attest it, are equivalent to a publication where that is required by a power. That case is not quoted as an authority that the attestation here is sufficient, but that the publication is. In all the cases cited on the other side, the thing required to be done was wanting. The question is rather one of reasonable interpretation than of law: the Court is to put a rational construction upon the word "delivered," with reference to the particular instrument to which it applies. If a party were to sign and seal an instrument *inter vivos*, and giving it to another, were to say, "I publish this deed," would not that be a sufficient delivery? Further, the 54 *Geo.* 3, c. 168, which was passed in order retrospectively to remedy certain defects in the attestation of instruments made in the exercise of powers, supplies a strong argument in favour of the defendant, because it shews that the legislature recognised the law that *equipollent* words might be used in the attestation. There, it is contended that the publication is attested, although *alio nomine*. The inclination of the Court in *Ward v. Swift* was to consider delivery equivalent to publication; and in *Simeon v. Simeon* (s) the Vice Chancellor expressly so held.

(p) 1 Sug. Pow. 419.
(q) 2 Ld. Ken. 68.

(r) 4 Burn's Eccl. Law, 130.
(s) 4 Sim. 555.

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Watson in reply.—Unless the term “deliver,” in the case of a will *ex vs termini*, imports “publish,” this is not a valid execution. The reasonable interpretation of the term “publish,” in the case of a will, is, that the testator shall inform the witnesses that he is executing that instrument, which the power contemplated. In *Simeon v. Simeon* it was not necessary to decide the present point; and Sir *E. Sugden* assumes that the will was duly acknowledged and delivered, and that it was the delivery that was held to amount to a publication. It is not easy to define the meaning of a mere delivery of a will.—[*Parke, B.*—Something whereby the party acknowledges that the instrument is a complete act, and no longer ambulatory.]—With regard to the other point, *Churchill v. Dibdin* is distinguishable, it was there clear from the whole will that the testatrix intended to dispose of all the lands subject to the power.

Cur. adv. vult.

In the present Term, the judgment of the Court was delivered by

LORD ABINGER, C. B.—This was a case from the Court of Chancery, argued in this Court in *Hilary Term* last. The question turned upon the execution of a power by a married woman, given to her by her marriage settlement, to appoint to uses by her *last will and testament in writing*, or by any codicil or codicils thereto, *signed and published* in the presence of, and attested by, three or more credible witnesses. The will purported to be signed, sealed, and *delivered* by the testatrix, in the presence of three witnesses, whose names are subscribed to that declaration. There were two objections urged to the due execution of this power. The first was, the want of the word *published* in the attestation. The second, that even if the word “delivered” were held to be equivalent to “published,” it did not appear that the instrument was delivered as the last will and testament of the testatrix. The law has given no definition of the meaning of the word *published*, when applied to a will. It certainly cannot mean that the whole contents of the will should be made known to the witnesses. If it means anything less than that, there is no reason why delivery should not be publication. Delivery is a publication, to those who are present, of the completion of the instrument, the signing and delivery of which they are called upon to attest. If this case, therefore, were original, we should be disposed to think that *delivery* was equivalent to publication. But there is sufficient authority to be found for this opinion. *First*, that of Lord Chief Justice *Gibbs*, in *Moodie v. Reid*; next, that of the Vice Chancellor, in the case of *Simeon v. Simeon*, and also in the case of *Lempriere v. Valpy*; and last, though not least, that of Lord *Lyndhurst*, and the other members of this Court, in *Ward v. Swift*. Upon the second point, it appears to us that the act to be published is the execution of the instrument, and not the nature of it. The act of execution is not only to be in the presence of the prescribed number of witnesses who must see it signed, but it is to be accompanied by some act or declaration in their presence, signifying that it has been completed. If, therefore, the word “published” would have been a sufficient description of the act done, without the addition of the words, “as a last will and testament,” so the word “delivered” equally denotes a publication, and requires no further addition. Upon these grounds, we shall certify our opinion that the testamentary instrument, stated in the case, was a due execution of the power.

Certificate accordingly.

PATRICK v. COLERICK.

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TRESPASS for breaking and entering the plaintiff's close, and with horses, carts, &c., carrying away and converting the straw of the plaintiff. Second count for taking away the straw of the plaintiff. *Pleas*:—*First*, not guilty; *Second*, that the straw was not the property of the plaintiff. *Third*, as to entering the close of the plaintiff and a little damaging the earth and soil of the said close, &c., the defendant says, that just before the said times when, &c. he was lawfully possessed, as of his own property, of certain straw, and being so possessed, the plaintiff, with force and arms, &c., and without the leave or licence, and against the will of the defendant, seized the said straw and wrongfully carried away the same and placed the same upon the close in which, &c., and wrongfully detained it therein, wherefore the defendant made fresh pursuit after his said straw, and then quietly and peaceably entered the said close in which, &c., with the said horses, &c., the same then being necessary and proper for that purpose, in order to retake his said straw, and did then and there quietly and peaceably retake his said straw, and load the same upon the said last mentioned wagons, and carry the same away as he lawfully might, doing no unnecessary damage to the plaintiff, which are the said several alleged trespasses, &c. *Verification*.

If a party wrongfully places the goods of another upon his own land, the owner of the goods may enter and re-take them.

Replication taking issue on the first and second pleas. *Demurrer* to the last plea, and *joinder*.

V. Lee in support of the demurrer. The defendant cannot justify his entry upon another's land for the purpose of taking his own goods, *Anthony v. Haney (a)*.—[*Parke, B.*—In that case, it did not appear who took the defendant's goods and placed them on the plaintiff's land; here, it is distinctly stated that the plaintiff wrongfully carried away the defendant's goods and placed them on his own close. It is expressly decided in the Year Books, 21 *H. 6*, 30, *Vin. Abr.*, that if a man takes my goods and places them upon his own land, I may enter and re-take them.]—The plea should shew that the entry had no tendency to produce a breach of the peace.—[*Parke, B.*—The rule is clear, that where the plaintiff wrongfully places the goods of another on his own land, he gives the owner an implied licence to enter and re-take them.]

R. V. Richards, who appeared to support the plea, was not called upon by the Court.

Per Curiam.—In this case there must be

Judgment for the defendant (*b*).

(a) 8 Bing. 186.

(b) Com. Dig. "Pleader," 3 M. 39;
Bro. Abr. "Trespas," 186; 2 Roll.

Rep. 55; 2 Roll. Abr. "Trespas,"
565.

Eschequer.

TROUP v. BOFFI.

In a plea of discharge under the Insolvent Debtors' Act, the plaintiff replied that although he was named in the defendant's schedule, "yet he did not at any time before the making of the said order have any notice whatever of the filing of the petition upon which the defendant applied for his discharge, and of the said schedule, and of the time, and place appointed for hearing of the matters of such petition and schedule." The replication was held ill, on the ground that it was not shewn that the plaintiff was ignorant of the petition, the filing of the schedule, and of the time and place of hearing, and also, that it did not appear that he was entitled to any notice, there being nothing to shew that his debt amounted to the sum of 5l

ASSUMPSIT. The declaration stated that the defendant was indebted to the plaintiff in 100l. for goods sold and delivered, and on an account stated.
Plea:—Discharge under the Insolvent Act.

Replication. That although the plaintiff was named and inserted by the defendant as a creditor of the defendant's, for and in respect of the causes of action in the said declaration mentioned in the schedule of the defendant, and of and from the debts contained in which, and no other, the said defendant was discharged by the said order in the said plea mentioned; yet the plaintiff did not at any time before the making of the said order have any notice whatever of the filing of the petition upon which the defendant applied for his discharge as aforesaid, and of the said schedule, and of the time and place appointed for hearing the matters of such petition, and that at the time of the filing of the said petition and schedule, and thence continually, until the making of the said order, the plaintiff was resident within the United Kingdom, to wit, in the city of *London*, and could and might and ought to have been served with such notice according to the said Statute, whereof the said defendant was always well aware. **Verification.**

Demurrer, assigning for causes that the plaintiff relied upon the want of notice to him of the filing of the petition, and of the schedule and hearing, whereas the omission to give such notice was the omission of the Insolvent Court, or its officers, and did not invalidate the defendant's discharge; and that the want of such notice was at most only a ground for applying to that Court to re-hear the petition, or to review, vary, or discharge their order, and also, that the plaintiff had not shown that his debt amounted to five pounds. And further, that it did not appear whether the plaintiff relied upon the want of notice to himself personally, or on the want of notice in the *London Gazette*.
Joinder.

J. Jervis in support of the demurrer.—The plaintiff admits that the debts are properly described in the schedule, but relies upon the want of notice of the filing of the petition of the schedule, and of the time and place of hearing. The plaintiff, however, is not bound to give notice of these matters, for the 42d section of the Insolvent Act, 7 G. 4, c. 57 (a), authorizes the Insolvent Court to regulate the mode of giving notice to creditors. This is an attempt to induce this Court to review the practice of the Insolvent Court, and to adjudicate on the sufficiency of the notice required by that Court. If the defendant has been improperly discharged from his debts, the 67th section

(a) 7 Geo. 4, c. 57, s. 42, "the said Court shall cause notice of the filing of every such petition and schedule, and of the time and place so appointed as aforesaid, for hearing the matters of such petition and schedule to be given by such means as the said Court shall direct to the creditor or creditors at whose suit any such prisoner shall be detained in custody, or the attorney or agent of such creditor or creditors, and to the

other creditors named in the schedule of such prisoner, and resident within the United Kingdom, and whose debts shall amount to the sum of 5l. and to be inserted in the *London Gazette*, and also if the said Court shall think fit, in the *Edinburgh* and *Dublin Gazettes*, or either of them, and also in such other newspaper or newspapers as the said Court shall direct."

affords a remedy (*b*), for it directs that in that case the Insolvent Court shall re-hear the matter, and if necessary, shall annul the original adjudication. Again, the 42d section enacts, that notice of the petition and schedule shall be given to those creditors only whose debts amount to 5*l*. The plaintiff has not shown that his debt amounts to that sum. The averment that he has had no notice, is ambiguous; it may mean that he has had no personal notice; but it is consistent with the replication that he may have been aware of the filing of the petition, and that notice of it may have been left at his dwelling-house.—[*Alderson, B.*—For any thing that appears to the contrary, he may have been in the Insolvent Court during the entire hearing of the case.]—Again, this may be a description of debt for which notice in the *Gazette* is sufficient, and yet the meaning of the plaintiff may be, that he has had no personal notice.

Hoggins, for the plaintiff.—In this case, the defendant was not entitled to his discharge, until due notice of his petition and schedule had been given to the creditors, *Sharpe v. Gye* (*c*) *Pugh v. Hookham* (*d*). It was unnecessary for the plaintiff to aver that the debt from which the defendant was discharged amounted to 5*l*, since the declaration states a debt of 100*l*, and the defendant, by his pleadings, must be taken to have admitted that more than 5*l*. is due.—[*Lord Abinger, C. B.*—The defendant admits no more to be due than may be found due after a writ of enquiry.—*Parke, B.*—He admits that something is owing, but claims to be discharged from it, whatever may be the amount.]

Per Curiam.—The plaintiff may amend on payment of costs, otherwise, there will be judgment for the defendant.

Rule accordingly.

(*b*) Section 67, enacts, “that every such adjudication as aforesaid by the said Court, commissioner, or justices as aforesaid, in the matter of any prisoner’s petition, and the order thereupon so made as aforesaid, shall be final and conclusive, and shall not be reviewed by the said Court, unless the said Court shall hereafter see good and sufficient cause to believe that such adjudication has been made on false evidence, or otherwise improperly made, or fraudulently obtained, in which case it shall and may be lawful for the said Court, upon application of such prisoner, or of

any creditor of such prisoner, to order such prisoner, upon due notice to be given to such persons, and in such manner as the said Court shall direct, to attend, or to be brought up, and the said matter to be re-heard before the said Court or one of the commissioners thereof on his circuit, or such justices as aforesaid as the case may require, who shall thereupon re-hear the same, and shall and may, if just cause shall appear, annul the original adjudication and order thereupon made in such case.”

(*c*) 4 Car. & P. 311.

(*d*) 5 Car. & P. 376.

SAMUEL v. DUKE, Knt., FORD, and Another.

TROVER against the sheriff, the execution creditor, and another, for converting the goods of the plaintiff. *Pleas*.—*First*, not guilty. *Second*, that the plaintiff was not possessed of the goods and chattels in the declaration mentioned,

Where a creditor has sued out a writ of *fi. fa.* against the goods of his debtor, and has

afterwards abandoned it, he cannot under the same writ, take the goods of the debtor in the hands of a *bona fide* purchaser.

In an action of trover brought by the *bona fide* purchaser of goods against the sheriff and the execution creditor, for seizing under a *fi. fa.* which had been abandoned by the creditor, the defendants pleaded jointly not guilty, and that the plaintiff was not possessed of the goods as of his own property.

Held, that as the plaintiff had a right to treat the seizure as the act of conversion, the sheriff could not, under those pleadings, shew that he had a right to seize the property.

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 DUKE.

At the trial before Lord Abinger, C. B., at the *London* Sittings after *Hilary Term*, 1838, it appeared that one *Browning* being indebted to the defendant *Ford*, gave him, on the 6th *September*, 1836, a warrant of attorney for the amount of the debt, which was to be paid by instalments. The debt remaining unpaid, the defendant *Ford* issued a writ of *fi. fa.*, and on the 10th *December* in the same year, delivered it into the hands of the sheriff, the other defendant. This writ was executed, and certain property which was proved to belong to the sister of *Browning*, was taken in execution. Subsequently, on the 5th *January*, 1837, the sister gave the defendant *Ford* a warrant of attorney, payable by instalments, to secure her brother's debt; upon which *Ford* told *Browning* that he had obtained a warrant of attorney, and that the goods seized were released from the execution. On the 5th *January*, 1837, *Browning* applied to *Ford* for another advance of money, to be made on the security of furniture at *Browning's* chambers; no advance, however, was made. *Ford* afterwards found in the sheriff's office the old writ under which the goods of Miss *Browning* had been taken in *December*, 1836, and in *June*, 1837, delivered it to the defendant, the sheriff, who seized at the chambers the furniture which was then claimed by the plaintiff under a bill of sale, bearing date the 15th *April*, 1837. The learned Chief Baron directed the jury to consider whether the defendant *Ford*, by taking the warrant of attorney and by his declaration that the goods were released, had not evinced an intention of abandoning the writ of 10th *December*, 1836. The jury found a verdict for the plaintiff, damages 48*l.* 19*s.* *Platt* having obtained a rule to shew cause why this verdict should not be set aside and a nonsuit entered,

F. Kelly and *R. V. Richards* shewed cause.—The sheriff was not justified in seizing the plaintiff's property under a writ which had been abandoned by the execution creditor.—[*Parke*, B.—The question is, whether a creditor who after execution has agreed to abandon his writ, can afterwards enforce it so as to avoid mesne incumbrances, or whether it must not be considered a new writ from the time that he attempts to enforce it.]—*Prima facie*, the goods are bound from the delivery of the writ to the sheriff, and the debtor cannot alienate them, but this inability to alienate them cannot last for ever, and must be held to have terminated in this case as soon as the defendant *Ford* evinced an intention of abandoning his writ. The delivery of the writ does not take the goods absolutely from the debtor until the writ has been executed. *Payne v. Drewe* (a) shews that a writ of sequestration, which resembles a *fi. fa.*, does not bind the goods absolutely so as to prevent the sheriff from selling under a writ subsequently directed to him. In that case, the writ of sequestration remained unexecuted eighteen months, and that circumstance was one ground on which the Court decided that the goods were not absolutely bound by the first writ. In the present case there is an interval of six months between the suing out of the writ and its execution, in addition to the declaration of the defendant *Ford*, that the goods were released. Again, the defendants cannot avail themselves of their present defence under the pleadings on this record, for as the property is not by the writ divested out of the plaintiff, and the defendants possess, at most, a mere right of seizure without any right of property, they ought to have pleaded specially. *Owen*

v. Knight (b) differs from this case, because there the defendant was entitled to the possession of the property in dispute. Here the seizure by which the defendants obtained the goods, is treated by the plaintiff as the act of conversion.

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 DUKK, Not.

Platt, and J. Bayley, contrd.—The effect of the delivery of the writ to the sheriff is, to take from the debtor the right of assigning his property, except in market overt; and the rule is reasonable, because it is the duty of a purchaser to ascertain at the sheriff's office whether any writs have been issued against the property that he is about to purchase.—[*Alderson, B.*—Your argument goes to this extent, that if the present plaintiff had sued a third person for taking these goods, that person could set up the writ and execution as a defence.]—No one, except the sheriff and the creditor, could avail himself of this defence.—[*Alderson, B.*—Then if the property passes as against some parties, but not as against others, does not that matter require to be specially pleaded.]—*Parke, B.*—According to your argument, if a man possessed goods worth 10,000*l.*, and a writ was sued out against him for 100*l.*, he could not pass away the smallest portion of those goods.]—*Owen v. Knight* shews that the present defendant was not bound to plead specially.—[*Parke, B.*—If the seizure did not constitute the conversion, the sheriff may say that at the time of the conversion he had a right of possession, and under these pleadings may give in evidence his right to seize; but where, as in the present case, the plaintiff treats the seizure itself as the act of conversion, can you argue that the pleadings are correct? In *Owen v. Knight* the defendant who held the deed was entitled to the possession by virtue of his lien; had the sheriff in this case any right of possession before the seizure, and if he had, ought he not to have pleaded it?]

LORD ABINGER, C. B.—I think there was evidence for the jury that *Ford* had abandoned the execution, and if he had done so, it would not afterwards revive. It was in the power of the sheriff to put forward a separate defence, and the plaintiff might then have been able to prove that the sheriff had notice of the abandonment of the execution; but the time for that defence has passed; the two defendants now stand on the same ground, and the abandonment of the execution by *Ford*, affects the sheriff as well as himself. I am of opinion that the property is not absolutely changed by a writ of *fi. fa.*, but only so far bound as to allow an execution creditor to pursue it when in the hands of another. The case of *Payne v. Drew* decides, that property is not changed until a sale has actually taken place. The effect of that doctrine is, that property may be assigned, subject to certain obligations. And as in this case the property did pass to the plaintiff, notwithstanding the writ of *fi. fa.*, I think this rule must be discharged.

PARKE, B.—The point reserved for our consideration is, whether the transfer which was made to the plaintiff after the delivery of the writ, is to be considered as absolutely void. It is clear from the *Equity Cases Abridged*, that subsequently to a writ of *fi. fa.* a party may convey property, subject to the right of seizure, under that writ. In this case, the property passed to the

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plaintiff, but the sheriff was justified in seizing it under the writ. But Mr. Platt goes further, for he says, that the sheriff was at liberty, not only to seize, but to sell the property. The answer to that argument is, that Ford had agreed to abandon the execution; and as there was sufficient evidence of the abandonment, I think that Browning might have disposed of the goods and have brought an action against any one who took them away; and, therefore, that a purchaser from him might do the same. If a distinction could have been taken between Ford and the sheriff, the latter might have defended himself against this action, because he was bound to look at the writ only, and to seize all the goods that belonged to Browning at the time of delivery of the writ, unless he received a countermand from Ford; but no such distinction was taken at the trial, and if such defence had been attempted, the plaintiff might have been able to shew a countermand from the defendant Ford. But it is unnecessary to give an opinion on this point, as I think the sheriff could not have offered that justification under these pleadings. It was necessary for him to shew that he had a lawful possessory right to this property, and he could not do that in a case where the seizure itself constitutes the conversion.

BOLLAND, B., and ALDERSON, B., concurred.

Rule discharged.

DIGNAM v. IBBOTSON.

Where the defendant is bound to accept short notice of trial, and the plaintiff omits to give such next opportunity for the trial, the defendant is afterwards entitled to the regular notice.

A RULE had been obtained calling upon the plaintiff to shew cause why the verdict obtained by him should not be set aside for irregularity, under the following circumstances: on the 11th November, 1837, the defendant obtained an order for four days' time to plead, on condition of "pleading issuably, rejoining gratis, and taking short notice of trial, if necessary, whether before the sheriff or not." The defendant resided in Yorkshire. On the 3d and 5th January, 1838, two short notices of trial were delivered to his attorney, both of which were returned to the plaintiff. On the 17th, another short notice of trial, before the sheriff, was sent to the defendant's attorney and retained by him. The cause was afterwards tried as undefended, and the plaintiff obtained a verdict. It appeared that the sheriff is in the habit of sitting twice in each week for the trial of causes.

C. Jones, now shewed cause, and contended, that the words, "if necessary," gave the plaintiff the option of delivering short notice of trial or otherwise; and that as the defendant had obtained the indulgence of four days' time to plead, he was bound to accept short notice, *Le Fevre v. Molineux* (a), and that at all events, he had waived the irregularity by keeping the notice.

Per Curiam. The only difficulty in this case is, that there is no mention of any specific time for which notice of trial ought to be given. The case however must be governed by the rule that applies to notice of trial for sittings after term, where if a party, after giving notice, suffers one sitting to elapse,

he must then give the regular notice. The defendant therefore was entitled to the usual notice of trial, and we do not think he has waived his right by keeping the notice that he received. The rule must be made

Absolute with costs.

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ELLIS v. THOMPSON and KEBBEL.

ASSUMPSIT. The declaration stated, that it was agreed between the plaintiff and the defendants, that the plaintiff should sell, and the defendants should buy two hundred tons of lead, deliverable in the river *Thames*, at 22*l.* per ton. That within a reasonable time after the making of the promise, the plaintiff was ready and willing, and tendered and offered to the defendants to deliver to them the said two hundred tons of lead, but that the defendants would not accept or pay for the same; by reason whereof, the plaintiff was forced to sell the lead at a lower price than the defendants had agreed to pay him, to the plaintiff's damage, &c. *Pleas*:—*First, non assumpsit*; *Second*, that the plaintiff did not tender, or offer to deliver the lead to the defendants within a reasonable time, and issue thereon. At the trial before Lord Abinger, C.B., at the Sittings in *London* after *Michaelmas Term*, 1837, the following facts appeared in evidence. The plaintiff was part owner of a lead mine, in the county of *Salop*, called the *Bog Mine*; the defendants were lead and iron merchants in the city of *London*. The *Bog Mine* is distant about sixteen miles from *Shrewsbury*, and the practice of the plaintiff was to send the lead ore to be smelted at a place midway between the mine and the town of *Shrewsbury*. When the lead was smelted, it was conveyed to *Shrewsbury*, to be shipped from thence to *Gloucester* or *Liverpool*, the ports nearest to that place, both of which are nearly equidistant from *London*. The greatest part of the lead when ready for delivery, was kept at *Shrewsbury*, but there was a small depôt at *Gloucester*. On the 22d *March*, 1837, the following contract, on which this action was brought, was made between the plaintiff and the defendants, and was inserted in the bought and sold notes, thus, "Bought for account of Messrs. *Wm. Thompson and Co.* of Mr. *Thos. Ellis*, two hundred tons of *Bog Mine* lead, deliverable in the river *Thames*." After the verbal making of the contract and before the bought note was written, the broker told the plaintiff that the lead was ready for shipment; the broker believed, but had no certain knowledge, that the lead was lying at *Shrewsbury*, and he stated at the trial, that *Gloucester* and *Liverpool* were the "ports" from whence *Bog Mine* lead was generally shipped. On the 25th *March*, the broker informed the defendant *Kebbel* that if the lead was shipped from *Liverpool* or *Gloucester*, the plaintiff would allow the expence of freight or insurance from either of those places. On the 5th *April*, the defendants ordered the lead to be sent to *London*; it was forthwith shipped at *Shrewsbury* on board small craft, to be conveyed along the canal to *Gloucester*, and after being transferred to larger vessels, was forwarded to *London*. But owing to the want of water between *Shrewsbury* and *Gloucester*, considerable delay took place, and the lead did not reach *London* till the 27th *May*. When it arrived, the defendants refused to receive it as a fulfilment of the contract,

Where a written contract for the sale of goods is silent as to the time of their delivery, parol evidence is admissible, to show facts from which the reasonableness of the time of delivery may be inferred, as such evidence does not vary the contract.

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alleging that it had not been sent in a reasonable time; but it was ultimately agreed that they should buy it at the rate of 16*l.* per ton, without prejudice to the right of disputing their liability to perform the original agreement. Lord Abinger, C. B., in addressing the jury, said, "I think, therefore, that we may take it for granted, that the understanding on the part of the defendants and the broker who so made the contract was, that the lead was ready for shipment at one of those two places, (*Gloucester* or *Liverpool*), and it is further confirmed, by the application made to the broker by *Kebbel* on the very next day, or the day but one after, to know from him whether Mr. *Ellis* would undertake to consent to pay the freight and insurance from *Liverpool* or *Gloucester*, as the case might be." His lordship then told the jury that *Shrewsbury* could not be the place of shipment, but that what was meant was, the place of shipment for the river *Thames*; that the time of delivery would begin to run from the 5th *April*, and that the question, therefore, was whether the plaintiff had performed his contract in a reasonable time; whether, in fact, he occupied more time than an average voyage would have required them to occupy. No objection was taken at the trial to the admissibility of the broker's statement that the "lead was ready for shipment;" nor did the plaintiff's counsel interfere to prevent his lordship from laying this statement before the jury. The jury found a verdict for the defendant. In *Hilary Term*, *Crowder* obtained a rule to shew cause why the verdict should not be set aside and a new trial granted.

Maule and Sir *W. W. Follett*, now shewed cause.—This rule has been obtained on two grounds; *first*, that the broker's evidence, that the lead was ready for shipment, was not admissible, as its effect was to vary a written instrument; *secondly*, that the learned Chief Baron, misdirected the jury as to the effect of that evidence. Admitting the evidence to have been inadmissible, and the learned judge to have been wrong in his direction, still there is no ground for a new trial, as the evidence was not objected to at the time, and the judge was not required to submit the case to the jury in a different manner. If improper evidence is offered, the counsel should object to its admission; if the judge misdirects the jury, the counsel should suggest his own mode of putting the question to them; and if he is overruled, he has a ground for applying for a new trial; but until he interposes, the judge may conclude that he is content to admit the evidence, and that he is satisfied with the direction. If an unstamped instrument which requires a stamp, is read at the trial without objection, its admission under such circumstances forms no ground for a new trial. But in truth, the statement of the broker was admissible in evidence, for neither its object nor its tendency was to vary the written contract, but to shew that the lead was not delivered within a reasonable time. The written agreement was silent as to the time of the delivery. The omission, therefore, might be supplied by parol evidence: the statement of the broker shewed that the goods were at *Gloucester* or *Liverpool* ready for shipment; the broker, therefore, contracted to deliver them, and the defendant to receive them within such time as would be necessary for the voyage between either of those two places and *London*. The question of what is a reasonable time for the delivery of goods, is not an abstract question, but is dependant upon circumstances; and the important circumstance in this case is, that, according to the statement of the plaintiff's agent, the lead

was lying at *Gloucester*, ready for delivery. If a party had agreed by a written contract to purchase wine of a merchant, and no mention was made of the time when it was to be delivered, would it not be competent for the buyer to shew the situation of the merchant's cellars, with a view to determine the reasonableness of the time.—[Lord Abinger, C. B.—The issue in this case was upon the reasonableness of the time of delivery: the written instrument is a mere naked contract, giving no information upon this point; it required explanation, and might be explained by parol evidence.]—The plaintiff gave evidence similar to that which he now objects to; for, with the view of persuading the jury that the lead was understood to be shipped from *Shrewsbury*, he proved that the plaintiff had a depôt at that place. The learned judge was right in directing the jury that the shipment was to be made from *Gloucester*, for putting the lead on board small vessels at *Shrewsbury* to be removed into others at *Gloucester*, could not, with any propriety of language, be termed a shipment.—[Alderson, B.—Shipment means putting commodities on board a sea-going vessel.]

Crowder and Kaye, contrâ.—The broker was the agent of the plaintiff, and therefore the latter could not object to his evidence. Nor could a counsel interrupt the judge, and suggest the mode in which a question ought to be submitted to the jury. But it was quite a different point whether the evidence was to be admitted, and whether when admitted it was to have the force of a warranty. The plaintiff contends that the statement of the broker ought not to be incorporated in the contract.—[Alderson, B.—The contract is not varied by the broker's statement; suppose the buyer had asked when he was to expect the lead, and the answer had been, that it was lying at *Gloucester*, would not that be a rational answer?—The learned Chief Baron was wrong in directing the jury to infer that the shipment was to take place at *Gloucester*. The defendants could not have supposed that the lead was lying at that place, for they must have been acquainted with the locality of the Bog Mine, and have known that the plaintiff's principal depôt was at *Shrewsbury*. It was also in evidence, that lead is termed "ready for shipment" as soon as it is smelted, and this was known to the broker.—[Lord Abinger, C. B.—You contend, in fact, that I ought to have rejected the broker's declaration as to the place where the lead was, and to have introduced his mere knowledge or belief that the lead was at the mine.]—The communication between the parties with regard to the freight and insurance, implies that the lead was to be delivered at *Shrewsbury*.

Lord ABINGER, C. B.—The issue in this cause is not upon the existence of the contract, but upon the question whether the goods were delivered within a reasonable time. And the present motion is made on the grounds, *first*, that I received parol evidence which tended to vary a written contract; and *secondly*, that I misdirected the jury as to the effect of that evidence. Where a contract says nothing as to time, the question of time is a collateral point; and if it could be inferred from the instrument itself, all parol evidence would be excluded. But where the contract is short and silent upon the subject, no opinion can be formed of the reasonableness of the time, if all extrinsic evidence is rejected. Suppose a bare contract to be made for the sale of goods, and the question to arise whether they had been delivered within proper time,

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might you not, with a view to determine that question, show where the goods were manufactured? Mr. *Crouder* says he was at liberty to prove that *Shrewsbury* was the contemplated place of shipment, if that be so, his own argument establishes that parol evidence was properly admitted in this case. The broker said, that *Liverpool* and *Gloucester* where the ports nearest to the Bog Mine. I, therefore thought, that the time should be measured from those places; but the tendency of the plaintiff's argument is, that I ought to have submitted to the jury what the broker thought, and not what he actually said. Then it is urged that the letter from *Kebbel* to the broker, shews that the parties believed the lead to be at *Shrewsbury*; but that argument is fallacious. The parties contract for lead to be delivered from *Gloucester* or *Liverpool*, and an application is made to the plaintiff to deduct the freight and insurance from those places; if the defendant had thought the lead was at *Shrewsbury*, he would have asked for the freight and insurance from that place. Again, the defendants, who were lead merchants, and acquainted with the fluctuating nature of that commodity, were not likely to have bought it at *Shrewsbury*, when its conveyance from that place to *London* might have occupied many weeks. I, therefore, thought that the reasonableness of the time was to be calculated from the place from which both parties supposed the lead was to be shipped, and that it was a question for the jury, whether the reasonable time had been exceeded.

BOLLAND, B.—I think there has been no misdirection in the present case. I was struck with the argument of Mr. *Maule*, that the plaintiff was too late to take any objection to the admissibility of the statement of the broker, because a party ought not at the trial to waive all objection to the admission of the evidence, and after taking his chance of a favourable answer, apply to the Court for a new trial, on the ground of the reception of this very evidence. There are many cases where evidence is admitted by tacit consent, which would be rejected by the judge at the trial, if he were called upon to do so. The alleged misdirection consists in the mode in which the Chief Baron directed the jury with regard to the answer of the broker. He told them that the words "ready for shipment," meant that the goods were to be shipped from *Liverpool* or *Gloucester*: that does not amount to a misdirection, as the jury were capable of forming an opinion on the subject, and they have adopted the view of the learned judge. If we look at the contract, there is nothing that points to the locality of the lead, or indicates that it must have been at *Shrewsbury*. But considering the statement of the broker, we shall be induced to conclude, that the shipment was to take place from the port of *Gloucester* or *Liverpool*.

ALDERSON, B.—This action is brought to recover a balance of the price of two hundred tons of lead, which by the terms of a certain written contract were to be delivered in *London*. The time of the delivery was not specified, and when that is the case, the law implies a reasonable time. It became a question at the trial, how the reasonableness of the time was to be ascertained; and I think the correct mode of ascertaining that point, was by placing the jury as nearly as possible in the situation of the contracting parties, and laying before them all the circumstances of the case. The contract is for the sale of Bog Mine lead; those terms apprise the purchaser of the situa-

tion of the mine, and of the place where the lead first appears in a saleable state. But the parties wish for further information: they desire to know the exact situation of the lead, with a view to ascertain when they may expect to receive it, the answer is, that it is "ready for shipment," but where? The usual ports of shipment are *Gloucester* or *Liverpool*, any one therefore who received an answer that the lead was ready for shipment, would expect it to be delivered at one or other of those two places. The jury were to form their opinion, and to say whether a longer time had been taken for the delivery of this lead, than is usually occupied in the voyage between either of those two places and *London*. They have found that the time employed was unreasonable, and I think their verdict is right. But then it is said, that this view of the case is altered by the correspondence, in which the defendants require a deduction of the freight and insurance. My construction of the letter is, that the defendants intended to take the lead at *Liverpool* or *Gloucester*, and that they requested the plaintiff to ship it at one of those places. These letters confirm the evidence of the broker.

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Lord ABINGER, C. B., stated that *Parks*, B., who had left the Court during the argument, concurred with the rest of the Barons.

Rule discharged.

ATLEE and others v. BACKHOUSE.

May 1.

ASSUMPSIT for money had and received, and on an account stated.

Plea: non assumpsit. The plaintiffs were distillers, the defendant was the Receiver-General of the Excise. On the night of the 1st *September*, 1834, the officers of the excise entered the plaintiffs' premises, and seized as forfeited 11,000 gallons of spirits, together with wagons, vats, pump, and utensils. On the next day, the plaintiffs wrote the following letter to the Commissioners of Excise:—

"Honourable Sirs—An extensive seizure of spirits has been made last night and this morning. Your honours' officers will detail to you the whole particulars. We have to crave your honours' indulgence that the spirits seized may be restored to us, we on our parts entering into bonds to give security for the payment of what penalty may have been incurred upon the investigation of the case.

"I remain, for partners and self,

"Your honours' obedient Servant,

"*John Atlee.*"

The proposal contained in this letter having been rejected by the board of commissioners, the plaintiffs on the 4th of *September*, addressed another letter to the board, requesting the restitution of their property, upon paying into the hands of the Receiver of the Excise, the value of the spirits, &c.; namely, 6,500*l.*, to abide the result of a trial or investigation. They subsequently wrote other letters to the commissioners, petitioning for the restitution of their property upon payment of the sum of 6,500*l.*, and 5000*l.* unconditionally.

A party whose goods have been *bond fide* seized by the officers of excise as forfeited, and who without alleging the illegality of the seizure, spontaneously pays money to the commissioners of excise to obtain the restitution of them cannot afterwards recover back the money so paid.

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In consequence of these letters, the wagons, &c. of the plaintiffs were restored to them, upon their paying the sum of 200*l.*, the commissioners declining to comply with the rest of their demands. On the 11th *September*, the plaintiffs wrote the following letter:—

" To the Honourable Commissioners of His Majesty's Excise.

" Honourable Sirs—Your honours are aware that on the night of the 1st of *September* instant, an extensive seizure was made by your officers of spirits, vats, and wagons, upon our premises, for an alleged breach of revenue laws on the part of our servants. Without entering now upon the merits of the case we are most anxious to avoid the great anxiety attendant upon any legal proceedings, and to remove the grievous hindrance and interruption which the seizure of our property has unavoidably occasioned to the prosecution of our business, we therefore respectfully crave of your honours, that on our paying the sum of 5000*l.* " the whole of the property should be restored to us."

This proposal having been rejected by the commissioners, the plaintiffs on the same day wrote another letter in the same terms, and concluded thus, " We therefore respectfully crave of your honours, that on our paying the sum of 5,962*l.* 14*s.* together with the 200*l.* already paid by us to the collector as under, the whole of the property seized should be restored to us."

Upon receiving this letter, the commissioners intimated to the plaintiffs, that they could not accept any offer for the restoration of the seizure, the acceptance of which might prejudice any proceeding that they might be advised to institute for penalties. One of the plaintiffs then wrote the following letter to the commissioners:

" Honourable Sirs—I beg to state that by our paying the sum of 6,162*l.* 14*s.* we give up all claim to the seizure, holding ourselves responsible for such proceedings for penalties as the board may think fit to institute."

The above sum was the value of the goods taken under a writ of appraisement, which had been previously sued out. The commissioners acceded to the proposal contained in this letter of the plaintiffs, and the goods were restored to the latter on payment of the above sum into the hands of the defendant. The plaintiffs did not complain in any of their letters that their property had been illegally seized. An information against the plaintiffs for penalties was afterwards filed by the Attorney General, and was tried in *London*, in *May*, 1835, when a general verdict for 1,000*l.* was taken for the crown by agreement. This money was paid to the defendant, and by him distributed according to the provisions of the Act of Parliament. In *February*, 1837, the defendant first received notice of the intention of the plaintiffs to sue for the recovery of the sum of 6,000*l.*, and afterwards the action was brought. At the trial before Lord *Abinger*, C. B., at the *London* Sittings, after *Trinity Term*, the plaintiffs were nonsuited. *Erle* having obtained a rule to shew cause why the nonsuit should not be set aside and a new trial granted,

Sir *J. Campbell*, A. G., Sir *R. M. Rolfe*, S. G., *Tancred*, and *Kaye*, shewed cause.—The plaintiffs are not entitled to recover in this action; *First*, because the contract on which they paid their money, and received back their

goods was entirely voluntary, and was a valid contract on good consideration. *Secondly*, because the defendant is a mere receiver, and has paid over the money in question without any notice. The plaintiffs' letters shew that they were anxious to avoid a condemnation of the goods, and that with that view, they had voluntarily paid the money. The contract for the payment of the money was valid, as the 7 & 8 Geo. 4, c. 53 (a), s. 98, enables excise commissioners to restore seizures, and compound penalties at any time before judgment. The crown made a *bonâ fide* seizure of the plaintiffs' goods, and instead of proceeding to condemn them, consented to restore them on being paid a less sum than the actual value of the goods. That is a sufficient consideration for the payment of this money by the plaintiffs. If we assume it to be doubtful, whether these goods would have been ultimately condemned, still there is a sufficient consideration for the payment of this money. *Longridge v. Dorville* (b). If this had been merely an executory agreement, the crown might have enforced it, and it would have been no defence to urge the illegal nature of the seizure. It cannot be said, that this money is recoverable, as money paid under compulsion; because in all cases of money paid under 98th section of the Act, there must be a species of duress.—[*Parke, B.*—But for that section of the Act of Parliament, the crown would be obliged to proceed with the seizure.]—The cases of distress and execution differ from these, because there the goods are in the nature of a pledge for the payment of the rent. Here the seizure is absolute. In *Irving v. Wilson* (c), which

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(a) That section is as follows:—
 “and be it further enacted, that in all cases where any penalty or forfeiture shall be incurred under or by virtue of this Act or any other Act or Acts of Parliament relating to the revenue of excise, and it shall appear to the satisfaction of the commissioners of excise, or the commissioner or commissioners and assistant commissioners of excise in Scotland and Ireland respectively, that the same was incurred without any intention of fraud, or of offending against this Act, or any other Act or Acts of Parliament relating to the revenue of excise, it shall be lawful for such commissioners of excise or commissioner or commissioners and assistant commissioners of excise in Scotland and Ireland respectively, to forbear to order any prosecution for the recovery of such penalty, or upon such terms and conditions as they respectively shall order in that behalf to forbear to order any prosecution for the condemnation of such seizure, and to restore such seizure to the proprietor or proprietors, or claimant or claimants thereof; and that in all cases where any prosecution shall have been commenced, or shall be depending for the recovery of any duty or any penalty incurred, or for the condemnation of any seizure made under or by virtue of this Act, or any other Act, or Acts of Parliament relating to the revenue of ex-

cise, it shall be lawful for the commissioners of excise, or the commissioner or commissioners and assistant commissioners of Scotland and Ireland respectively, at any time before judgment shall be thereupon respectively entered up, or given, to compound any such prosecution respectively, by the acceptance of such sum of money as they respectively shall deem fit and reasonable in that behalf, for any such duty, or in mitigation of any such penalty, or for and in lieu of the value of any such seizure, in, or by way of compromise of such prosecution, and upon payment and satisfaction thereof to stay all further proceedings, and to restore the seizure to the proprietor or proprietors, or claimant or claimants thereof, making or entering into such compromise. Provided always, that if any such proprietor or claimant of any such seizure as aforesaid shall accept such terms and conditions as aforesaid, or shall receive back any such seizure upon such terms and conditions, no such proprietor or claimant shall have or be entitled to maintain any action or suit for any recompence or damages, on account of the seizure or detention thereof; any law, custom, or usage, to the contrary thereof in anywise notwithstanding.”

(b) 5 B. & Ald. 117.

(c) 4 T. Rep. 485.

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sioners of excise to make any compromise in respect of goods seized, except in cases where they might be able to prove the legality of the seizure at any period within six years. I think therefore that this rule must be discharged.

PARKE, B.—I am of the same opinion. We must assume it as a fact in this case, that the money was paid over by the excise officer to *Backhouse*, and by him to the bankers of the Treasury, before any notice was given; and then no action would lie against the defendant. For, although, if no compromise or condemnation had taken place, an action might have been sustained against the officer who made the seizure, it does not follow that an action will lie against the person to whom he has paid it over. The reason why an action for money had and received was held to lie against the bailiff in *Snowden v. Davis* (o) is, that the money was not paid for the purpose of being delivered to the sheriff, but in order to get rid of the execution.

In the absence of the other circumstances of this case, an action might lie against the officer who seized the goods, but not against *Backhouse*, who, unless he has received notice, stands in the situation of a mere middleman. It appears to me, that this money being paid to the commissioners under an agreement cannot be recovered, and that the plaintiff is precluded from recovering by the Act of Parliament itself. When the matter was first before me, I doubted whether such a compromise as this was binding, but I now think it has a binding operation independently of the Act of Parliament. Mr. *Erle* says, that a party may recover money which has been paid to redeem goods wrongfully taken; and he alleges, that in the present case the goods were under duress. His argument is, that this cannot be considered a voluntary payment, as the parties were not on a footing of equality. But the question is, whether there was a binding agreement; I am of opinion that there was, that it was final, and that its conditions were, that upon the goods being re-delivered, the seizure should not be called in question, nor any attempt made to get back the money. There was also a sufficient consideration for this agreement; neither the plaintiffs nor the commissioners considered the seizure as illegal, both parties acted with perfect *bona fides*, the plaintiffs agreed to pay a certain sum of money, the commissioners to deliver up the goods. The crown relinquished the beneficial right of a summary proceeding against the goods, and received from the plaintiffs the sum of 6,162*l.* 14*s.* The case resembles *Longridge v. Dorville*, without being exactly parallel. One circumstance is common to both, namely, that the party against whom the action had been brought, had abandoned a valuable right. This rule must be considered as discharged on this latter ground.

BOLLAND, B.—It appears from the letters that the settlement was voluntary on the part of the plaintiffs, and made on a full and adequate consideration. The object of the plaintiffs was to obtain a return of their goods; with this view, they make several propositions to the commissioners, which are rejected; and finally, they agree to pay a large sum of money, and to hold themselves responsible for such proceedings for penalties, as the board should think proper to institute. (His lordship here read the two last letters of the plaintiffs to the commissioners.) In these letters, the plaintiffs have stated the

reason why they desired restoration of their property, and they seem to have viewed the transaction in the same light in which this Court is disposed to regard it. Without entering, therefore, upon the question of notice, I think this rule must be discharged.

Erchequer.

 ATLEE
 " "
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GURNEY, B.—The compromise which has taken place in the present instance has been made upon sufficient consideration. The crown possessed the advantage of being able to try this question in a very speedy manner, and has relinquished the right of doing so. That circumstance affords a sufficient consideration for the payment of this money by the plaintiffs; and if they were able to recover it in this form of action, the consequence would be that they might wait till witnesses were dead, or till the commissioners were otherwise prejudiced in their defence by lapse of time, and might then try the legality of this seizure in an action for money had and received. It is not necessary to decide the question of the payment over of this money by the defendant, since the case may be decided on the other ground.

Rule discharged.

COSTER v. WILSON, Bart., and WEBB, Knt.

TRESPASS against magistrates for assault and false imprisonment. The declaration stated that the defendants on, &c., imprisoned the plaintiff in *Maidstone* gaol, whereby he was prevented from attending to his necessary affairs, and was forced to expend a large sum of money in procuring his discharge by *Habeas Corpus*. *Plea*: Not guilty. At the trial before *Tindal*, C. J., at the *Maidstone* Spring Assizes, 1835, it appeared that the plaintiff had occupied certain premises the ownership of which was disputed, that he had paid rent to one of the parties who claimed to be landlord, and that afterwards, by permission of that party, he had removed his goods from the premises. The person to whom the rent had been so paid appeared before the magistrates when the prisoner was brought up for examination, produced his title deeds, and claimed to be owner of the premises from which the goods had been removed. On the 21st *April* the defendants made the following order:

"*Kent* (to wit). Be it remembered, that on the 21st day of *April*, in the year of our Lord 1837, at *Woolwich* in the county of *Kent*, *Mary Curran*, of *Woolwich* aforesaid, in the said county of *Kent*, widow in her own person came before us Sir *Thomas Maryon Wilson*, Baronet, and Sir *John Webb*, Knight, two of His Majesty's justices of the peace in and for the said county, residing near the place where the goods and chattels hereinafter mentioned were removed, (we, or either of us, not being interested in the messuage and premises whence the goods and chattels were removed as hereinafter mentioned), and informed us in writing that on the 19th day of *April* then instant, *Thomas Coster*, late of the parish of *Woolwich* aforesaid, labourer, unlawfully and fraudulently did convey away and carry off from a certain messuage and premises situate in *Short's Alley* in the parish of *Woolwich* aforesaid, in the said county, whereof the said *Thomas Coster*, had been for sometime previously, and was then and there the tenant by the month, under and from her the said *Mary Curran*, upon the holding of which said messuage and pre-

An order under 11 G. 2, c. 19, s. 14, which states that witnesses were examined by the magistrates upon oath, is not bad because it omits to allege that the witnesses were examined upon oath, as to the value of the goods removed.

A warrant of commitment is not invalid for omitting to state that complaints were made in writing, and that the witnesses were examined upon oath, if statements to that effect are contained in the order, and the order is incorporated in the warrant.

Magistrates are empowered by 11 G. 2, c. 19, to determine whether goods have been removed fraudulently, even in cases where there are conflicting titles to the premises.

are conflicting titles to the premises.

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mises, a certain rent (that is to say) the sum of *5l. 5s. 10d.* of lawful *British* money, was then and there reserved, due, and payable from the said *Thomas Coster* to the said *Mary Curran*, certain goods and chattels of him the said *Thomas Coster*, to prevent the said *Mary Curran* from distraining the same for the said sum of money, being such arrears of rent so reserved, due, and payable as aforesaid, the value of such goods and chattels so as aforesaid conveyed and carried off, not exceeding the value of *50l.* of lawful money of *Great Britain*, contrary to the form of the Statute in such case made and provided, whereupon the said *Thomas Coster*, after being duly summoned to answer the said charge in the said information, appeared on this 12th day of *May*, in the year of our Lord 1837, at *Woolwich* aforesaid, in the said county before us the said justices, and having heard the charge contained in the said information, declared that he was not guilty of the said offence. Whereupon we the said justices did proceed to examine into the truth of the charge contained in the said information, and did examine several credible witnesses, being all proper witnesses upon oath as to the truth of such charge; and it manifestly appearing to us that the said *Thomas Coster* is guilty of the said offence charged upon him in the said information; we do hereby determine, declare, and adjudge, that the said *Thomas Coster* is guilty of the said offence with which he is so charged, and by this our order, under our hands and seals, do declare and adjudge the said *Thomas Coster* forthwith to pay to the said *Mary Curran*, the landlord of the said messuage and premises, the sum of *10l. 11s. 8d.* of lawful money of *Great Britain*, (which we have inquired into and ascertained to be double the value of the said goods and chattels in the said information mentioned), according to the form of the Statute in that case made and provided." Dated the 12th *May*, 1837. Signed and sealed by the two defendants.

The sum of *10l. 11s. 8d.* remaining unpaid, and there being no goods of the plaintiff on which a distress could be made, the plaintiff, on the 29th of *June*, 1837, was apprehended upon the following warrant of commitment.

"Whereas *Thomas Coster*, late of the parish of *Woolwich* in the county of *Kent*, labourer, was, by an order dated the 12th day of *May*, 1837, under the hands and seals of Sir *Thomas Maryon Wilson*, Baronet, and Sir *John Webb*, Knight, two of Her Majesty's justices of the peace, acting in and for the said county of *Kent*, residing near the place whence the goods and chattels hereinafter mentioned were removed, and not being interested in the messuage and premises whence such goods and chattels were removed as hereinafter mentioned, ordered to pay the sum of *10l. 11s. 8d.* of lawful money of *Great Britain* to *Mary Curran* of *Woolwich* aforesaid, in the said county, widow, being double the value of certain goods and chattels of the said *Thomas Coster*, which the said *Thomas Coster* was then and there before us duly found, adjudged, and declared guilty of having fraudulently conveyed away, and carried off from a certain messuage and premises situate in *Shorts Alley*, in the parish of *Woolwich* aforesaid, in the said county, whereof the said *Thomas Coster* had been for some time previous and was then and there the tenant by the month, under and from her the said *Mary Curran*, certain goods and chattels of him the said *Thomas Coster* to prevent the said *Mary Curran* from distraining the said goods and chattels for arrears of rent due to the said *Mary Curran*, from the said *Thomas Coster*, for the said messuage and premises. And whereas the said *Thomas Coster* having notice of our said order has refused and neglected to pay, and hath not paid the said sum of *10l. 11s. 8d.*

pursuant thereto, and the same hath been fully proved before us; And whereas it appears to us, by the return of *Joseph Butterfill*, constable of the said parish of *Woolwich*, dated this 23d day of *June* instant, that he hath made diligent search for, but doth not know of nor can find any goods and chattels of the said *Thomas Coster*, by distress and sale whereof the said sum of 10*l.* 11*s.* 8*d.* may be levied, pursuant to our warrant duly made and issued for the levying the said sum of 10*l.* 11*s.* 8*d.* by distress and sale of the goods and chattels of the said *Thomas Coster*. These are therefore to command you the said constable of *Woolwich* aforesaid, to apprehend the said *Thomas Coster*, and convey him to the said house of correction, at *Maidstone* aforesaid, and deliver him there to the said keeper of the said house of correction; and these are also to command you the said keeper of the said house of correction, to receive him the said *Thomas Coster* into the said house of correction, and there to keep him to hard labour without bail or mainprize for the space of six months, unless the said sum of 10*l.* 11*s.* 8*d.* so ordered to be paid as aforesaid, shall be sooner satisfied. Given under our hands and seals at *Woolwich* aforesaid, in the said county of *Kent*, the 23d day of *June*, in the year of our Lord, 1837." Signed and sealed by the two defendants.

Under this warrant the plaintiff was conveyed to *Maidstone* goal. A writ of habeas corpus having been obtained, the plaintiff was, on the 4th *July*, discharged by *Patteson, J.*, at chambers, on the ground that the warrant was invalid. It was objected at the trial, that the warrant of commitment was bad. The Chief Justice stated to the jury, that the warrant embodied the order, and that, in his opinion, it was valid. A verdict having been found for the defendant,

Platt moved for a rule to shew cause why the verdict should not be set aside, and a new trial granted on the ground of misdirection.—The magistrates have no jurisdiction to decide a case like the present, where there are conflicting claims to the premises from which the goods are removed, and where the payment of rent to one of the claimants shews an absence of all fraud on the part of the plaintiff.—[*Parke, B.*—Fraud is a question for the adjudication of the magistrates.]—The order of the magistrates is bad, as it does not appear on the face of it, that they received evidence upon oath as to the value of the goods.—[*Lord Abinger, C. B.*—They state in their order that they examined witnesses upon oath, and then they find, as part of the charge against the plaintiff, that he was guilty of removing goods of less value than 50*l.*]—This statement of the magistrates does not form part of the charge against the plaintiff, but merely amounts to a shewing of their jurisdiction. The warrant of commitment is also bad, as it does not appear that any complaint was made in writing, or that the witnesses were examined on oath.

Per Curiam.—The warrant of commitment incorporates the order, inasmuch as it recites it. The Court must construe the conduct of magistrates fairly and liberally. There will be no rule.

Rule refused (*a*).

(*a*) As to whether a proceeding under this Statute is an order or a conviction, and as to the distinction between an order and a conviction, see *Rex v. Bissse*, Burn. tit. "distress" sect. 5; *Rex*

v. Middlehurst, 1 Burr. 399; *Rex v. Morgan*, Cald. 156; and the observation of *Williams, J.*, in *Day v. King*, 5 Ad. & Ell. 367; 2 Har. & Woll. 178, S. C.

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POPE and others v. BAYNARD.

The *Blackheath* Court of Requests' Act excepts from the jurisdiction of the Court any debt "for any sum being the balance of an account originally exceeding 5*l.*:"—

Held, that this does not apply to accounts containing items amounting in the whole to more than 5*l.* and reduced by part payments from time to time, so that at no one time was there so much as 5*l.* due.

ASSUMPSIT for goods sold and delivered. *Plea:—Non-assumpsit.* The plaintiff claimed the sum of 3*l.* 17*s.* 6*d.* being the balance due for coals supplied to the defendant between *August*, 1832, and *July*, 1836. The cause was tried before the under-sheriff of *Middlesex*, when a verdict was found for the plaintiffs for the amount claimed. In *Hilary Term*, *Welby* obtained a rule to shew cause why a suggestion should not be entered on the record, in order to entitle the defendant to costs under the Court of Requests' Act for the hundred of *Blackheath*, &c., (6 & 7 *Will.* 4, c. 120).

By the 21st section of that Statute, the commissioners of the Court of Requests are empowered to decide and determine all disputes and differences between party and party, *for any sum of money not exceeding 5*l.**, in all actions or causes of debt, and in all cases of assumpsit or *insimul computasset*, &c., &c.

Section 22 enacts, that nothing in the Act contained shall extend to enable the said Court to judge, determine, or decide on (*inter alia*), any debt *for any sum being the balance of an account originally exceeding 5*l.**

Section 74 enacts, that if any action or suit for any amount recoverable in the said Court of Requests, shall be sued or prosecuted in any of his Majesty's Courts at *Westminster*, or elsewhere out of the said Court of Requests, and it shall appear to the judge or judges of the Court in which such action or suit shall be tried, that at the time of commencing such action or suit the defendant was within the jurisdiction of the said Court of Requests, and was liable to be warned and summoned before the said Court for such debt or demand, then and in such case the said judge or judges shall not allow the plaintiff any costs of suit, but shall award that the plaintiff shall pay such costs to the defendant as he shall justly prove that he hath incurred in the defence of such action or suit.

The following appeared from the affidavits to be the state of accounts between the parties :

| <i>Dr.</i> | | | <i>£</i> | <i>s.</i> | <i>d.</i> | <i>Cr.</i> | | | <i>£</i> | <i>s.</i> | <i>d.</i> |
|----------------|-------|-------------------------|----------|-----------|-----------|----------------|-------|---------|----------|-----------|-----------|
| <i>Aug.</i> | 1832, | 1 ton of coals | 1 | 6 | 0 | <i>June</i> , | 1833, | By cash | 1 | 0 | 0 |
| <i>Nov.</i> | 1832, | 1 ton ditto | 1 | 8 | 0 | <i>April</i> , | 1834, | Ditto | 0 | 18 | 0 |
| <i>May</i> , | 1833, | $\frac{1}{2}$ ton ditto | 0 | 12 | 0 | " | | Ditto | 0 | 12 | 6 |
| <i>April</i> , | 1834, | $\frac{1}{2}$ ton ditto | 0 | 12 | 6 | <i>May</i> , | 1835, | Ditto | 0 | 10 | 0 |
| <i>Oct.</i> | 1835, | $\frac{1}{2}$ ton ditto | 1 | 10 | 0 | <i>Feb.</i> | 1836, | Ditto | 1 | 14 | 0 |
| <i>Dec.</i> | 1835, | $\frac{1}{2}$ ton ditto | 0 | 16 | 0 | | | | | | |
| <i>Feb.</i> | 1836, | 1 ton ditto | 1 | 12 | 0 | | | | 4 | 14 | 6 |
| <i>July</i> , | 1836, | $\frac{1}{2}$ ton ditto | 0 | 15 | 6 | | | Balance | 3 | 17 | 6 |
| | | | | | | | | | | | |
| | | | | | | | | | 8 | 12 | 0 |

Moody shewed cause.—This is an action for the balance of an account originally exceeding 5*l.* The cases on the Court of Requests' Acts, may be

divided into two classes: one, where the right to costs depends upon the amount recovered by verdict, the other, where the jurisdiction of the inferior Court depends upon the nature of the demand. This case falls within the latter class. The cases in which it has been held that a debt reduced by part payment was within the provisions of the Act, will be found to belong to the former class, *Clarke v. Askew* (a). But in a case like the present, part payments do not bring the debt within the exception of the Statute. In *Fountain v. Young* (b), which arose on the *Southwark* Court of Requests' Act, (45 Geo. 3, c. 87), the exception in the Statute was, of "any debt for any sum being the balance of an account on demand originally exceeding 5*l*," and it was held that a debt originally exceeding 5*l*. but reduced below that amount by a part payment, was within the exception. In *Abley v. Lill* (c), where the exception was of debts "for any sum being the balance of an account or demand originally exceeding 5*l*," the Court held that an action to recover 3*l*. 6*s*. remaining due on a bill of exchange for 8*l*. 6*s*. with interest, was within the exception. This very point arose in *Moreau v. Hicks* (d), but the Court there gave no express judgment upon it. The omission of the words "on demand" in the present Act, shews the intention of the legislature to exclude cases such as this from the jurisdiction of the Court. Suppose the plaintiff had claimed in his particulars the whole amount, without giving credit for the sums paid, can it be said that the Court of Requests would have had jurisdiction. The plaintiff must prove his whole account in order to make out the balance due. It will be productive of much inconvenience if such a case as this be held to be within the Act, as the commissioners will be unable to tell whether or not they have jurisdiction, until the case has been investigated.

Welsby, contra.—The last objection will apply equally to the other class of cases where the jurisdiction is measured by the amount of the verdict. Here it appears, from the plaintiff's own statement, that at no time was there a sum of 5*l*. due from the defendant; that distinguishes this case from *Fountain v. Young* and *Abley v. Lill*. The argument on the other side must go to this extent, that even if every article except the last were paid for immediately after the purchase, yet the plaintiff might treat the price of the last item as a balance of account, and sue for it in the superior Court. Cases of this kind, where the account runs on, and part payments are made from time to time, are precisely those where the Court of Requests would be found most useful; and no more difficulty can arise in the investigation of them, than of a single disputed item.

PARKE, B.—As the question is of importance as regards the construction to be put on this and other similar Acts, the Court will take time to consider, in order that the point may be settled.

Cur. adv. vult.

In the present Term, judgment was delivered by

PARKE, B.—In this case an application was made to enter a suggestion to

(a) 8 East, 28; 1 Stark. 457.

(b) 1 Taunt. 60; 4 Esp. 113.

(c) 5 Bing. 299; 2 M. & P. 534.

(d) 2 A. & E. 782; 1 Har. & Wol. 87; 4 N. & M. 563.

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deprive the plaintiff of costs, on the ground that the defendant resided within the limits of the jurisdiction of the Court for the recovery of small debts at *Blackheath*, and that the debt was recoverable in that Court. The case turned upon the question, whether the debt was so recoverable. (His lordship read the 21st and 22d sections of the Act). The question is, whether this action was brought for *the balance of an account originally exceeding 5l.* We think it was not. The plaintiffs sought to recover a balance of 3l. 17s. 6d. due for coals, supplied at eight different times between *August, 1832, and July, 1836*, in small quantities, on account of which, payments were from time to time made, so that at no one time was so much as 5l. due from the defendant to the plaintiffs. We are of opinion that the Court of Requests had jurisdiction to decide upon this debt. The meaning of the term "originally," in the clause in question, is somewhat obscure, and has not been judicially decided; but we think it is to be understood to apply to a case where credit was given at one time for an amount exceeding 5l. either in one or different sums, although *afterwards* the credit might have been reduced under that sum by part payments, before the commencement of the suit in the superior Court; and that the Act of Parliament did not intend to deprive the Court of jurisdiction, whenever the plaintiff should claim, on the credit side of his account against the defendant, items altogether exceeding 5l., and would, in the usual conduct of a cause, prove to that amount *originally in the first instance*, before the defendant would go into his case of payment. The latter construction might be more convenient to the commissioners, as they would have no difficulty in ascertaining whether they had jurisdiction or not; but it would greatly narrow the utility of the Court, and disable creditors upon running accounts, for very small sums, from recovering a trifling balance. The former construction extends the jurisdiction of the commissioners, and gives them full power to decide in all cases, except where the transactions have been on so large a scale, as that credit is given at one time for an amount above 5l.

It is true that the commissioners are, by this construction, placed in a situation of some difficulty; for in taking the account, they will have, if they wish to be quite secure, not merely to ascertain the amount of the debts and credits, but the state of the account at different times; and if they should find that 5l. was ever due at one time, they cannot proceed, and the suit must be dismissed. Probably the practical inconvenience will be trifling.

For these reasons, we think the rule must be made absolute.

Rule absolute.

April 30.

M'KINNELL v. ROBINSON.

Money lent to enable another to play at an illegal game, cannot be recovered back.

ASSUMPSIT on a promissory note. *Second* count, money lent; *Third* count, account stated. *Plea*: As to the said second and last counts of the said declaration, the defendant says, that the said sum of 80l., in the said second count mentioned, was borrowed by the defendant, as the plaintiff then well knew, and was knowingly lent by the plaintiff to the defendant in a certain

common gambling room, in and parcel of a certain messuage and premises for the purpose of the defendant's illegally playing and gaming therewith, at and in the said gambling room, at a certain illegal game, to wit, the game of hazard, contrary to the Statute in such case made and provided, and that the said account, in the said last count mentioned, was had and stated of and concerning the said sum of 30*l.*, in the said second count mentioned, also borrowed and lent as aforesaid, and for and in respect of no other debts or monies whatever. *Verification.*

Demurrer. Assigning for cause that the several matters in the said last plea pleaded and set forth, afforded no answer to the said second and last counts, inasmuch as money lent for the purpose of gaming with, as in the said last plea mentioned, and money found to be due on an account stated respecting money so lent was recoverable by action at law.

Crompton in support of the demurrer.—It has been decided that money borrowed for the purpose of gambling may be recovered by action, *Barjeau v. Walmsley* (a).—[Lord Abinger, C. B.—Is it not illegal to lend money to enable a party to violate the law?—In *Alcinbrook v. Hall* (b), it was held that money paid by the plaintiff for the defendant who had lost it at a horse race, was recoverable by the former. In *Wettenhall v. Wood* (c), which was an action for money lent to the defendant to enable him to play at a common gambling house, Lord Kenyon held, that the money was recoverable, "for that the Statute of 9 Ann, c. 14, only avoided securities for money lent to play with, and did not extend to mere loans without any security taken." In *Robinson v. Bland* (d), Lord Mansfield held, that money lent by the plaintiff to Sir John Bland at the time and place of play, was recoverable. The case of *Young v. Moore* (e), where the defendant was discharged on entering a common appearance, does not apply to the present case, because there he had been arrested for money won at play, here the action is brought for money lent. Nor is this case within the Stat. 16 Car. 2, c. 7, as no mention is there made of money lent.

Wightman, contra.—The plaintiff cannot recover, since he shews that the money was lent to further an illegal transaction. In all the cases that have been cited, this circumstance was not brought to the notice of the Court. In *Robinson v. Bland*, where the money was lent to the defendant's intestate, Lord Mansfield says "Here the money was fairly lent without any imputation whatever." In fact it was lent at *Paris* where the game in question was not illegal. The game of hazard is absolutely illegal as it is played with dice, and therefore falls within the Stat. 13 Geo. 2, c. 19, s. 9.—[*Alderson*, B.—The third section of 12 Geo. 2, c. 28, imposes a penalty of 50*l.* on all who play at hazard.—*Parke*, B.—This money has been lent to enable a man to do an illegal act.—Lord Abinger, C. B.—The case of *Cannan v. Bryce* (f), is in point.]—In *Faikney v. Reymnos* (g), Lord Mansfield says, "if money be lent in order to pay a play debt, (supposing the lender not to have been present at the time and place of play), or in order to pay off an usurious con-

(a) 2 Stra. 1249.

(b) 2 Wils. 309.

(c) 1 Esp. N. P. C. 18.

(d) 2 Burr. 1080; 1 W. Black. 200.

(e) 2 Wils. 67.

(f) 3 B. & Ald. 179.

(g) 4 Burr. 2072.

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tract, or even to lend out upon usury; and a bond be given for securing the payment of the money so lent, such a bond will not be void. The obligor will be bound to pay it." An action will not lie when a party has no means of succeeding but by shewing an illegal transaction to which he is a party. After citing *Vaughan v. Whitcomb* (h), *Clayton v. Dilly* (i), and *Hastelow v. Jackson* (j), *Wightman* was stopped by the Court, who called upon *Crompton* to distinguish between *Cannan v. Bryce*, and the present case.

Crompton in reply.—The Statutes on gaming may be divided into two classes, the first class prohibits excessive and deceitful gaming, without making gaming itself illegal. The second class refers to gaming at public tables. This last class of Statutes may be termed Lottery Acts. The plea does not shew that the game of hazard was played at a common table. Two persons may sit down together privately and play at hazard in a common gambling house, provided they do not play at a public table—[*Lord Abinger, C. B.*—The Acts permit gambling within the royal palaces, that shews that their provisions extend to all other houses.—*Alderson, B.*—The 9th section of 13 *Geo. 2, c. 19*, allows backgammon to be played, how then can these Acts be termed Lottery Acts? You do not play at backgammon by way of lottery.]—The plea does not shew such a mode of playing as brings the parties within the provisions of the Acts.—[*Alderson, B.*—In *Cannan v. Bryce, Abbott, C. J.*, distinguishes between the payment of money on stock-jobbing transactions, and on losses at play. He states the former to be made illegal by the Statute, but observes, that 9 *Ann, c. 14*, contains no prohibition against the payment of money lost at play.]—The case of *Pellecat v. Angell*, (k), shews that a party who is concerned in illegal transactions, may yet recover in respect of them. It is not enough to state that the game of hazard is illegal, the plea ought to shew that it was played at a public gaming table. This is evident from the judgment of the Court in *Colborne v. Stockdale* (l).

Cur. adv. vult.

LORD ABINGER now delivered the judgment of the Court.—After stating the pleadings, his lordship proceeded:—As the plea states that the money for which the action is brought, was lent for the purpose of illegally playing and gaming therewith, at the illegal game of "hazard," this money cannot be recovered back, on the principle, not for the first time laid down, but fully settled in the case of *Cannan v. Bryce*. This principle is, that the repayment of money, lent for the express purpose of accomplishing an illegal object, cannot be enforced; and there is no doubt, that it is illegal for any person to play at hazard, by the 12 *Geo. 2, c. 28, ss. 2 & 3*, and 18 *Geo. 2, c. 34, s. 2*, which imposes a penalty of 50*l.* on all and every person who shall play at that game. But it is contended, that the authorities are so strong in favour of the maintenance of the action, that we ought not to decide against them. Those relied upon by the plaintiff are the cases of *Barjeau v. Walsley, Robinson v. Bland*, and *Wettenhall v. Wood*. The first of these cases

(h) 2 Bos. & Pull. N. R. 413.

(i) 4 Taunt. 165.

(j) 8 B. & Cr. 22; 2 Man. & Ry.
 209, S. C.

(k) 2 C. M. & Ros. 311; 1 Gale, 187;
 5 Tyrw. 945.

(l) 1 Stra. 496.

was decided upon the 9 *Anne*, c. 14, only. The action was not for money lent for the purpose of playing at a game expressly prohibited by the Statute, 12 *Geo.* 2, or any other Act; but for money lent, exceeding 10*l*., for the purpose of playing with it; and the propriety of the decision upon the construction of the Statute of *Anne* itself, may well be questioned, as there is much weight in the observations made in the subsequent case of *Young v. Moore*; that, as the Statute has made all securities for money won at play void, *a fortiori*, all parol contracts of that sort are void. In *Robinson v. Bland* also, the money was not lent to play with at an illegal game; and in *Wettenhall v. Wood*, Lord *Kenyon*, at *Nisi Prius*, held, that money lent to play with at a common gambling-house, could be recovered back, his Lordship adverting only to the Statute of 9 *Anne*, c. 14, and not having in view the provisions of 12 & 18 *Geo.* 2, by which all play at certain games is prohibited, and they who play rendered liable to penalties.

The case of *Alcinbrook v. Hall* was also cited for the plaintiff. It was an action for a sum not exceeding 10*l*., paid by the plaintiff for the defendant, for a lost wager at a horse race, and is like the case of *Barjeau v. Walmsley*; it was held that it was recoverable back, notwithstanding the Statute of 9 *Anne*. It may be doubted, since the case of *Cannan v. Bryce*, whether this case would now be supported: at any rate, the present differs from it, as all play whatever, at the game of hazard, is prohibited.

We, therefore, think that, notwithstanding these authorities, the money lent cannot be recovered, for it is lent for the express purpose of a violation of the law, and enabling the borrower to do a prohibited act; and the principle is now distinctly laid down in the case above cited, and may be considered as finally settled, that money so lent, cannot be recovered.

Judgment for the defendant.

HUCKMAN v. FERNIE.

ASSUMPSIT on a policy of insurance for 300*l*., effected by the plaintiff on the life of his wife, *Elizabeth Huckman*, with the defendant, the manager of a *British Commercial Insurance Company*. The declaration stated, that the plaintiff had declared in the policy, amongst other things, that *Elizabeth Huckman* was not afflicted with any disorder tending to shorten

An improper ruling of a judge, as to the right of a party to begin, may, in certain cases, be a ground for a new trial.

The plaintiff had stated, in answer to certain printed questions, that his wife (the life insured) had not been afflicted with certain disorders. His wife attended at the insurance office, and made the same statement. On the issue, that the wife had been afflicted with certain disorders, and that the fact was known to the plaintiff: the jury negatived the plaintiff's knowledge. *Held*, that the knowledge of the wife that her statements were false, could not be considered as the knowledge of the plaintiff: that she was not his general agent, but only his agent for the purpose of answering such questions as the insurance office might propose.

Semble, that the general agency of the wife, supposing it to be a good defence, ought to have been specially pleaded.

N. D., previously to 1832, had attended Mrs. *H.* during a serious illness; in 1832 she married the plaintiff, and he then ceased to attend her. At the time of the making of the policy, *E. E. D.* was the medical adviser of her husband, the plaintiff, but had attended her only once or twice, for a slight indisposition. On the issue, that *E. E. D.* was not her "usual medical attendant," the judge directed the jury to consider whether *N. D.* or *E. E. D.* was her usual medical attendant:—*Held*, that the judge should have required the jury to say further, whether *E. E. D.* could be considered her usual medical attendant at all; and on the ground of his omission so to direct the jury to do so, the Court granted a new trial.

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life, and that she had continued to lead a temperate life; and further, that the policy contained a proviso, that if any thing stated by the plaintiff, either in the declaration or attestation thereinbefore mentioned to have been made by him, should not be true, the said policy should be null and void. The declaration then averred, that the said declaration or attestation in the said policy mentioned, and so by the plaintiff made as aforesaid, was in all respects true; that *Elizabeth Huckman* died, and that the defendant refused to pay the plaintiff the sum of 300*l*.

Pleas.—*First*, that the declaration or attestation in the said policy was not true, as *Elizabeth Huckman* was afflicted with a disorder tending to shorten life.

Second, That the declaration or attestation was not true, as *E. H.* had not led, and had not continued to lead, a temperate life.

Third, That before the making of the said policy, the said *E. H.* deceased, had been and was afflicted with certain disorders, to wit, delirium tremens, and erysipelatous inflammation of the legs, and her legs had been and were ulcerated; and she had been and was, on various occasions, and from time to time, as well long before as also shortly before the making of the said policy, seriously ill, which the plaintiff, before and at the time of the making of the said policy, well knew, and which were facts material and necessary to be known to the said company before the making of the said policy; that the said plaintiff, before and at the time of the making of the said policy, wholly neglected and omitted to apprise and inform the said company of the said last mentioned several facts, and the same were not, nor was either of them at any time before the making of the said policy of insurance, in any manner communicated to the said company; but the said company were, at the time of the making of the said policy, wholly ignorant of the same, and by reason of the said premises and of the non-communication of the said last-mentioned facts by the plaintiff to the said company as aforesaid, the said policy was wholly null and void. *Verification*.

Fourth, That before and at the time of making the policy, *E. H.* was addicted to spirituous liquors, which had a tendency to shorten her life, and that that fact was not communicated to the company.

Fifth, Fraud and covin of the plaintiff.

Sixth, That before the making of the said policy, the said company delivered to the plaintiff a certain instrument in writing, containing and requiring divers questions to be answered, and matters to be stated in writing by the plaintiff, and to be then signed by plaintiffs, and returned to said company; one of such questions and matters being—who was the usual medical attendant of the said *E. H.*? and the said company then declined to make the said policy until such questions were answered and stated by the plaintiff; the said document being material in reference to the state of health of the said *E. H.*, whereof plaintiff then had notice; and that thereupon the said plaintiff, in answer to the said questions in reference to the name of the usual medical attendant of the said *E. H.*, answered and stated in writing in the said document, that *Mr. E. E. Day*, surgeon, *Bristol*, was the usual medical attendant of the said *E. H.*; and that the plaintiff then signed the last-mentioned document, and returned the same to the said company, and thereby then declared and agreed that his, the said plaintiff's, declarations and answers should be the basis of the contract for the said insur-

ance; and that he had not omitted nor concealed any matter material to be known to the assurers; that the said company, confiding in the truth of the said answer and matters so stated by the plaintiff, and believing the same to be true, the same being material, then made the said policy; whereas in truth and in fact the said *E. E. Day* was not the usual medical attendant of the said *E. H.*, as stated in the said document by the plaintiff as aforesaid, but a certain other person, then living, had been and was her usual medical attendant, wherefore the said policy was void in law. *Verification.*

Replication to the third and sixth pleas, *de injuriâ*; issue joined on the first and second; traverse to the fourth and fifth pleas.

At the trial, before *Tindal, C. J.*, at the summer Assizes at *Bristol*, 1837, the following facts were in evidence:—The plaintiff was a butcher, residing at *Bristol*; the defendant was the managing director of the *British Commercial Insurance Company*. The party, whose life had been insured, was *Mrs. Elizabeth Huckman*, the wife of the plaintiff. In *August*, 1832, the plaintiff and *Mrs. Huckman* first became acquainted; in *December* of the same year they were married. On the 15th *October*, 1833, the plaintiff made a proposal to the office of the defendant for an insurance on the life of *Mrs. Huckman*. A printed particular was thereupon given to the plaintiff, containing nineteen questions, to which certain answers were to be given. The particular was in the following form, and was filled up as under.

British Commercial Life Insurance Company, London.

Particulars and Declaration required on a proposal for Life Assurance.

Questions.

Answers.

10.—Whether she has ever been seriously ill; if so, when; and what medical gentleman attended her?

Never.

15.—Name of her usual medical attendant.

Mr. E. E. Day, surgeon, *Bristol*.

This proposal is to be signed by the person whose life is to be assured; and where one person insures the life of another, it must be signed by both parties.

I do hereby declare, that the above particulars and statements are true; and I agree that this declaration shall be the basis for the contract for the insurance of the life of *Elizabeth Huckman*; and that I have not omitted or concealed any fact known to the assurers. As witness my hand, this fifteenth day of *October*, 1833.

Witness,

T. P. Hinton,

Agent for *Bristol*.

James Huckman.

The mark ✕ of

Elizabeth Huckman.

Mrs. Huckman accompanied her husband to the office, and was afterwards twice examined by the surgeon and by the agent of the insurance office.

It also appeared in evidence, that *Mrs. Huckman*, in 1830, previously to her marriage, had been afflicted with delirium tremens, and erysipelatous inflamma-

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tion of her legs, and that she had been dangerously ill. She had been professionally attended by Mr. *Duck* during her illness, and up to her marriage with the plaintiff, in 1832.

In 1831, and also in 1832, Mrs. *Huckman*, before her marriage with the plaintiff, made proposals to two offices to effect insurances on her life. On one of these occasions, Mr. *Duck* was referred to as her medical attendant; and the result was, that the proposals were declined by the two offices. Mr. *E. E. Day*, the person mentioned by Mrs. *Huckman* as her usual medical attendant, had been the professional adviser of her husband's family for a period of fifteen years. In answer to a printed question by the company, whether he had attended her professionally, he said, "never;" and to another question, whether, at the time of the policy, he was her professional adviser, he said, "yes." At the trial, he stated that he had only attended her once or twice, accidentally, for a slight cold.

The defendant contended, that the burthen of proving the issues affirmatively lay upon him, and that he was therefore entitled to begin. *Tindal*, C.J., was of opinion, that the plaintiff was bound to prove the second issue, and that he was therefore entitled to begin. It was also contended by the defendant, that Mrs. *Huckman* was the agent of her husband; that her knowledge was his knowledge; and that as she must have been aware that she had been seriously ill, and had concealed that circumstance, the plaintiff must be taken to have known it also, and to have concealed it. The Chief Justice directed the jury to consider, whether the plaintiff knew, in *October*, 1833, that his wife had been afflicted with delirium tremens and erysipelatous inflammation, as his knowledge was essential to constitute a concealment; that fraud was not to be surmised; nor was it to be surmised that Mrs. *Huckman* had communicated to her husband the refusal of another office to effect an insurance on her life. With regard to the question upon the 6th issue, as to who was to be considered the usual medical attendant of Mrs. *Huckman*, his Lordship told the jury that it was for them to say, whether *Duck* or *Day* was the "usual medical attendant." The jury found a general verdict for the plaintiff; damages, 300*l.* They also found specially, that the plaintiff did not know of the illness of Mrs. *Huckman* previously to her marriage.

Crowder, in *Hilary Term*, obtained a rule to shew cause why the verdict should not be set aside, and a new trial granted, on three grounds:—*First*, that the defendant was entitled to begin; *Secondly*, that the judge misdirected the jury with regard to the plaintiff's knowledge of his wife's illness; and, *Thirdly*, that the judge misdirected the jury on the question of who was the "usual medical attendant."

Bompas, Serjt. shewed cause. This policy is a conditional agreement, and the plaintiff could not succeed, unless he shewed affirmatively that Mrs. *Huckman* had led a temperate life; he was bound to begin, and to prove this under the second issue. The right of beginning, is a point to be determined by the judge at *Nisi Prius*; and this Court will not grant a new trial, on the ground that he has decided erroneously, *Burrell v. Nicholson (a)*.—[*Alderson*, B.—That is rather a large proposition. Suppose a judge made a practice of directing that

the defendant was entitled to begin, would you contend that he might do so without controul, provided he was guilty of no misdirection? In many cases, as, for instance, in libel, the party who begins has a great advantage.—*Lord Abinger, C. B.*—You can hardly maintain, that a judge has a right to upset the uniform practice, because he is entitled to regulate it.—*Alderson, B.*—There is a case in the *Common Pleas*, parallel to the present (*b*), where that Court inquired into the propriety of an amendment ordered by *Lord Tenterden*.]—With regard to the third issue, the direction of the Chief Justice was right; for the wife was not the agent of the plaintiff for the purpose of binding him by her statement. The only issue raised on the third plea is, whether the plaintiff had any knowledge of the illness of *Mrs. Huckman*, and whether he concealed that fact. That knowledge must be actual personal knowledge. The question might be different if an issue had been taken on the point, whether *Mrs. Huckman* was aware that she had been afflicted with the diseases mentioned in the declaration, *Sweete v. Fairlie (c)*. The cases of *Everett v. Desborough (d)*, *Maynard v. Rhodes (e)*, and others of that class, do not apply here, as they were decided before the new rules, when every defence was admissible without being pleaded. With regard to the sixth issue, the jury were properly directed to consider whether *Mr. Duck* or *Mr. Day* was the “usual medical attendant” of *Mrs. Huckman*.

Crowder and Barstow, contrd.—*Mrs. Huckman* was the agent of the plaintiff, and capable of binding him by her representations; and as she must have known that she had been ill, and as she concealed that fact from the defendant, the plaintiff must also be held to have known it, and to have been guilty of concealing it.—[*Lord Abinger, C. B.*—The wife was not sent to effect the policy; if she had been sent, her knowledge would be that of her husband; as it is, she is only his agent for the purpose of answering questions.]—A policy is void, when it is effected by means of the misrepresentation of the insurer's agent, *Fitzherbert v. Mather (f)*, *Gladstone v. King (g)*, *Duckett v. Williams (h)*.—[*Alderson, B.*—In *Duckett v. Williams*, the truth of the statement was made part of the case. Does this plea enable you to prove that the wife was the agent of her husband?—In pleading, it is enough to aver generally, that a party knew a certain fact; the means of his knowledge are matter of evidence. A statement that a person had notice, is proved by evidence of a notice served upon his agent.—[*Alderson, B.*—You have pleaded the knowledge of the party; that means, of the party making the contract.]—The next question is, whether the statement of *Mrs. Huckman*, that *Day* was her “usual medical attendant,” is true or false; and upon that point the evidence shews, that *Duck*, and not *Day*, was to be considered as her usual medical attendant. With regard to the right to begin, the question to be considered is, upon whom does the substance of the issue rest, *Soward v. Leggett (i)*.—[*Alderson, B.*—The question is, who would get the verdict, if no

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(*b*) His lordship probably alluded to the case of *Masterman v. Judson*, 8 Bing. 228. See also *Pullen v. Seaven*, 2 Gale, 132; *Parry v. Fairhurst*, 2 Cr. M. & Ros. 190; *Parks v. Edge*, 1 Cr. & M. 429; *Doe, d. Poole v. Errington*, 1 Ad. & Ell. 750.

(*c*) 6 Car. & P. 1.

(*d*) 5 Bing. 503; 3 Mo. & Pa. 190, S.C.
(*e*) 5 Dow. & R. 266; 1 C. & Pa. 360, S.C.

(*f*) 1 Term Rep. 12.

(*g*) 1 M. & Sel. 35.

(*h*) 2 Cr. & Mee. 348; 4 Tyrw. 240, S.C.

(*i*) 7 Car. & Pa. 613.

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evidence whatever were given.]—The proviso in the policy throws the burthen of proof upon the defendant.—[Lord *Abinger*, C. B.—The proviso only states an inference of law ; without it, the policy would be a warranty ; the plaintiff must aver, and prove the truth of his declarations ; that shews that the issue lies upon him.]

Lord ABINGER, C. B.—We entertain no doubt upon the first question, being of opinion that the plaintiff was entitled to begin. But I should say, that if the judge, at the trial, forms a wrong opinion on that point, this Court would set the matter right. Very inconvenient consequences would arise from the violation of the general rule respecting the right to begin. We will take time to consider the other two points. The question of the agency is very important.
Cur. adv. vult.

Lord ABINGER, C. B., on a subsequent day (*May 2*), delivered judgment.—This was an action on a policy of insurance, in which the jury found a verdict for the plaintiff for the full amount claimed under the policy. A rule has been obtained for a new trial, and there are two points for our consideration. The third plea states, that the plaintiff concealed certain facts which were material and necessary to be known by the defendant. The evidence was, that the wife of the plaintiff was examined by the company, and it is considered that she omitted to mention certain material facts. It was contended by the counsel for the defendant, that, as she was the agent of her husband, her knowledge must be considered as his knowledge. The jury found that the husband was not aware of those facts which his wife had concealed. If the wife had been the general agent of her husband, commissioned by him to effect the policy, and had knowingly concealed material facts, that would be fraud, and would be sufficient to vitiate the policy. But in this case she is not the agent of her husband for the purpose of effecting the policy ; she is his agent only for the purpose of answering questions put to her by the officers of the insurance company. If those persons had put any questions tending to elicit particular facts, it might be necessary to consider whether she was not her husband's agent for the purpose of giving answers to those particular questions. But no such questions were asked ; and we therefore think that what is meant by the plea is, that the plaintiff had personal knowledge of these particular facts, and that he concealed them from the company ; and as the jury have found that he had no such knowledge, we do not see any reason for disturbing the verdict on that ground.

The next point is, whether *Day* could be considered the usual medical attendant of Mrs. *Huckman* ; and this point is not embarrassed with the question of agency. The plaintiff sends his wife to answer certain enquiries, and the case is therefore the same as if the answers had been returned by him. Mrs. *Huckman* is asked, who is her medical attendant. Suppose that question to have been put to a person who had had no medical attendant during the previous year ; if the answer had been, " I have had none," the next question would be, " Who *was* your medical attendant ? " the object of such inquiry being to extract the name of the medical person who is best able to give an account of the constitution of the party. Mrs. *Huckman* was bound to name the person who was capable of giving that information. Now, the facts are, that *Duck* attended her as lately as 1832, the year in which she

was married. Before her marriage she wished to effect a policy of insurance, and on that occasion *Duck* was referred to as her usual medical attendant; the policy was then declined. She married in *December*, 1832, at which time *Duck* had ceased to attend her. Mr. *Day* had been the usual medical attendant of her husband; and, it seems, that on one or two occasions, he had been accidentally called in to see her; but he had made no memorandum of those visits in his books; and when called upon by the company to say whether he had ever attended her professionally, he stated that he had not. At the trial, he said he had prescribed for her once or twice. The question now is, whether Mrs. *Huckman* gave a proper answer. The Chief Justice left it to the jury to say, whether *Duck* or *Day* was her usual medical attendant; and if that had been the real question, it was properly left to the jury. But there was another question behind, and that was, whether *Day* could be called her usual medical attendant at all. The word "usual," imports "habitual." *Duck* had attended her in serious illnesses; and although he had retired from business, he had not, in the proper sense of the words, ceased to be her usual medical attendant. He could have given information as to the state of her health and constitution. The Chief Justice should have told the jury that it was the duty of Mrs. *Huckman* to mention the fact, that Mr. *Duck* did not attend her at the time of the policy. Suppose *Day* had not attended her at all, what answer would she have returned? She must have known that the best answer to the question was, that which afforded the most information of the state of her constitution. It should, therefore, have been left to the jury to say, whether *Day* could be called her medical attendant at all. We think he could not; and that the jury drew a different conclusion in consequence of the Chief Justice's not assisting them with a definition of the words "usual medical attendant." And his assistance was rendered the more necessary, by the peculiar answer which Mrs. *Huckman* gave, which was calculated to deceive the insurance company, as she knew that *Duck* had been examined with reference to another policy, and that no policy was made upon his examination. The verdict is not satisfactory on this point, and there must be a new trial.

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Rule absolute.

GOULD v. DRAKE.

TRESPASS. The declaration stated, that the defendant assaulted the plaintiff, and gave him a great many blows and strokes, and forced and compelled him to go along divers public streets to a station-house, and imprisoned him there, &c. *Plea*, not guilty.

The plaintiff obtained a verdict, with one farthing damages, and the learned judge refused to certify, either under the 43 *Eliz.* c. 6, or 22 & 23 *Car.* 2, c. 9. The master having allowed full costs,

Dundas moved for a rule for the master to review his taxation. It was formerly considered, that an imprisonment necessarily included a battery; but

Trespass for assault, battery, and false imprisonment. *Plea*, not guilty. The plaintiff obtained a verdict, with one farthing damages, and the judge refused to certify, either under the 43 *Eliz.* c. 6, or 22 & 23 *Car.* 2, c. 9: *Held*, that the plaintiff was entitled to full costs.

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the later cases have not gone to that extent, *Rawlings v. Till* (a), *Bannister v. Fisher* (b), *Emmett v. Lyne* (c).—[*Parke, B.*—Your argument is, that though a battery may be included, yet, if the judge does not certify that it was, it must not be so taken]—The defendant was a constable, and pleaded the general issue, under the Statute of *James* ; but no battery is admitted. —[*Parke, B.*—The authorities are very strong the other way. In *Tidd's Practice* (d) the law is thus stated ; “ It is now settled that the Statute (22 & 23 *Car.* 2, c. 9), is confined to actions of assault and battery, and actions for local trespasses, wherein it is possible for the judge to certify, that the freehold or title of the land was chiefly in question ; therefore it does not extend to actions of *assumpsit*, false imprisonment, or the like.”]—He then referred to *Carter v. Fish* (e), and *Wiffin v. Kincard* (f).

PARKE, B.—It has been the constant and uniform practice, in all actions for false imprisonment, to tax the plaintiff his full costs.

Rule refused.

(a) 1 M. & Hurl. 360; 3 M. & W. 28.

(b) 1 Taunt. 357.

(c) 1 New Rep. 255.

(d) 9th edit. 963.

(e) 1 Str. 645.

(f) 2 New Rep. 471.

BRADLEY v. HOLDSWORTH.

A railway Act declared that “ all shares in the undertaking, should, to all intents and purposes, be deemed personal property, and be transmissible as such, and should not be deemed to be of the nature of real property.” Held, that such shares might be sold by verbal contract.

Semble, that this would be so, though the Act contained no such clause.

ASSUMPSIT on a special contract, for the sale and delivery of certain shares in the *London and Birmingham Railway Company*. The defendant pleaded, that the agreement, in the declaration mentioned, was and is an agreement respecting an interest in land, and that there was not any note or memorandum in writing of the same, pursuant to the Statute. *Replication* : that the agreement was not respecting an interest in land, and that there was a note in writing, &c.

At the trial, before *Coleridge, J.*, at the last *Liverpool Assizes*, the plaintiff proved a verbal contract for the sale of the shares. It was then contended, on the part of the defendant, that the shares constituted an interest in land, notwithstanding the provisions of the Act incorporating the company, (3 & 4 *W.* 4, c. xxxvi.) the 166th section of which declares, that they “ shall, to all intents and purposes, be deemed personal property, and be transmissible as such, and shall not be deemed to be of the nature of real property.” The learned judge reserved the point, and the plaintiff had a verdict.

Alexander moved, pursuant to leave, to enter a verdict for the defendant. —These shares constituted an interest in land, within the Statute of Frauds. In the case of *Rex v. Hull Dock Company* (a), lands purchased by that company, and converted into a dock, were held to be rateable to the poor, notwithstanding a clause in the Act of Parliament, which declared that the shares should be deemed personal property.—[*Lord Abinger, C.B.*—That was a rate

on the property in the hands of the company, not an assessment on the share of an individual proprietor.]—Shares in the *Vauxhall Bridge Company* have been held not to be within the reputed ownership clause of the Bankrupt Act, 21 Jac. 1, c. 19, inasmuch as the funds of the company issued out of real estate. *Ex parte Vauxhall Bridge Company (b)*.—[*Alderson, B.*—All the authorities were reviewed in the case of *Bligh v. Brent (c)*, where the question arose as to shares in the *Chelsea Waterworks Company*. That was a stronger case than the present, because there was no clause in the Act declaring that the shares should be deemed personal property. *Ex parte Lancaster Canal Company (d)*, is also against you.]

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LORD ABINGER, C. B.—I see nothing which can authorize us to say, that these shares are an interest in land. The Act of Parliament declares that they shall be deemed personal property, to all intents and purposes.

PARKE, B.—I have no doubt whatever that the shares of the proprietors are nothing more than personalty. They are simply a right to demand a share of the net produce arising out of the property of the company.

ALDERSON, B.—I conceive the interest would be the same, even without such a clause.

Rule refused.

(b) 1 Glyn & J. 101.
(c) 2 Y. & Coll. 268.

(d) 1 Mont. & Bli. 94

MORTIMER v. PREEDY.

DEBT, upon a parol demise, by the assignee, of reversion, against the lessee for the use and occupation of certain premises, situate in the county of *Middlesex*. The defendant pleaded, *First, nunquam indebitatus*; and *Secondly*, that the tenancy was determined by act and operation of law, before the plaintiff had any interest in the premises, and before any rent was due to him.

The cause was sent for trial to the Sheriff's Court, in the city of *London*, and the writ of trial was returnable on the 19th *January*. The court-day was on the 18th, on which day the cause stood in the list for trial; but the Court, being unable to get through the list, adjourned until the 20th, without having tried this cause. On the 20th it was tried before *Arabin, Serjt.*, when it appeared, that the plaintiff claimed 6*l. 5s.*, for one quarter's rent, due at *Michaelmas, 1837*. The premises were assigned to the plaintiff during the quarter for which the rent was sought to be recovered. It was objected, on the part of the defendant, *first*, that as the writ of trial was returnable on the 19th *January*, the learned Serjeant had no jurisdiction to try the cause; and *secondly*, that this was a local action, and could only be tried in the county of *Middlesex*. The learned judge directed the jury to find a verdict

A writ of trial was directed to the Sheriff's Court, in *London*. The writ was returnable on the 19th *January*; a Court was holden on the 18th, and adjourned until the 20th, on which day the cause was tried. *Semble*, that the judge had no jurisdiction to try the cause after the writ was returnable. *Quare*, as to whether debt for use and occupation by the assignee of the reversion against the lessee, is local.

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for the plaintiff, for the sum claimed, and gave the defendant's counsel leave to move on the above points.

Mansel having obtained a rule to shew cause why a *venire de novo* should not be awarded into the proper county,

R. Gurney shewed cause.—The Court having sat on the 20th, by adjournment, the cause must be considered as, in fact, tried on the 18th. In *Sherman v. Tinsley* (a), the objection appeared upon the record; but the Court said, that as the defendant had appeared at the trial, they could not say that there was no jurisdiction; and, they added, that if it were necessary, they would amend the record. In the present case, no amendment is required, it appearing by the record that the proceedings are correct, as the trial is stated to have taken place on the 18th, which was before the writ was returnable. This is the usual mode of entry, when the Court is adjourned. The rule applicable to the *Nisi Prius* Sittings, which are, in contemplation of law, but one day, governs this case. So, with respect to the Assizes, the death of the defendant, between the commission day and day of trial, is no ground for setting aside a verdict for the plaintiff, *Jacobs v. Miniconi* (b); *Anonymous Case* (c); *Taylor v. Harris* (d). It is the same as if the Court had commenced trying the cause on the 18th, and being unable, for want of time, to finish, it had unavoidably stood over until the 19th.

Then, as to the *second* point, it is said, that this action is local, and *Boid v. Cudmore* (e), is relied upon by the other side; that, however, was the old action of debt, which depended upon the privity of estate. There the plaintiff set out the demise and accruer of title to himself, and described the locality of the premises, the right to the action accruing only from the possession of the land. But assuming the action to be local, this objection is aided after verdict, by the 16 & 17 Car. 2, c. 8, *Mayor of London v. Cole* (f). Until the 11 Geo. 2, c. 19, s. 14, passed, the old action of debt was the only remedy of the assignee of the reversion, when the demise was, as here, by parol. That Statute gave the action for use and occupation; and it is maintainable by the assignee without attornment, *Lumley v. Hodgson* (g). In debt for use and occupation, it is not necessary to state the situation of the premises, *King v. Fraser* (h); *Kirlland v. Pounsett* (i).—[*Parke, B.*—*Lumley v. Hodgson* was for rent, in the time of the reversioner; here you are seeking to recover by-gone rent.]—No objection was made at the trial that the plaintiff claimed too much.—[*Alderson, B.*—Should it not have been pleaded, that the premises were in another county?]

Mansel, in support of the rule.—The judge of the Sheriff Court would have no jurisdiction to try the cause, except what is given by the 3 & 4 W. 4, c. 42, s. 17, and is expressly defined by it. The case is analogous to writs of *mesne process*, or execution, where nothing can be done upon the writ after it is returnable. The defect is not cured by the entry on the record, as

- (a) 3 Hodges, 32.
- (b) 7 T. R. 31.
- (c) 1 Salk. 8.
- (d) 3 B. & P. 549.
- (e) Cro. Car. 183.

- (f) 7 T. R. 583.
- (g) 16 East, 99.
- (h) 6 East, 348; 2 Smith, 462.
- (i) 1 Taunt. 570.

the judge had no power to make the proceedings *nunc pro tunc*. This is distinguishable from the case of the death of the defendant between the commission-day and the day of trial, because the Assizes are but one day; but here, the authority to try the case is circumscribed by the writ of trial. Even if the trial had commenced on the 19th, and not concluded on that day, the judge would have had no authority to order an adjournment. After the writ was returnable, all power to try the cause was at an end. The proper course would have been, to have resealed the writ. A witness could not be indicted for perjury, where a trial had taken place under these circumstances.

PARKE, B.—There is a considerable difficulty on the first point; I think the defendant had better pay the money, and the parties agree to a *stat pro cessus*. If the cause is not tried before the writ is returnable, the proper course is to apply to a judge to extend the time for the return of the writ. There may be also some difficulty as to the plaintiff's right to recover the whole amount; he is seeking to recover, not only a compensation for the use and occupation of the premises during the time that he was assignee, but also for some part of the time that they were in possession of the reversioner.

ALDERSON, B.—The parties had better consent to this arrangement, as there are difficulties about the trial taking place after the writ was returnable.

Rule discharged, on the above terms.

MAUDE v. NESHAM and another.

ASSUMPSIT by the plaintiff, as one of the public officers of the *Darlington* Joint Stock Banking Company. The declaration was, for money paid for the defendants, and for interest. The defendants pleaded, *thirdly*, as to 500*l.* parcel of the money in the first count mentioned, that on the 11th *January*, 1836, they, the defendants were possessed of a certain bill of exchange, theretofore drawn by the defendants upon and accepted by one *C. Mason*, whereby they required the said *C. Mason* to pay to the order of them, the defendants, 500*l.* six months after the date thereof; and thereupon, on the day and year last aforesaid, in consideration that the defendants would indorse and deliver the said bill of exchange to the said company, the said company then agreed to and with the defendants to lend to, or pay, or lay out, and expend for the defendants, the sum of 500*l.*, from time to time, in such sums and in such manner as the defendants should thereafter require and direct, and to hold and retain the said bill of exchange for and on account, and as a payment of the said sum of 500*l.*; and the defendants, in fact, further say, that they, the defendants, did then accordingly indorse and deliver the said

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For *assumpsit*, for money paid, &c. the defendant pleaded as to 500*l.*, parcel, &c. That on the 11 *January* they were possessed of a bill of exchange, drawn by them upon, and accepted by one *M.* for payment to their order, 500*l.*, six months after date; and thereupon, in consideration that defendants would indorse the bill to plaintiff, he agreed to lend to, or pay, lay out and

expend 500*l.*, in such sums and in such manner as the defendants should direct; and to hold the bill for and on account, and as payment of the said sum of 500*l.* *Averment*, that defendants indorsed the bill, and that the plaintiff took it, and holds the same on account and as payment of the said sum of 500*l.*; that the sum of 500*l.*, parcel, &c., is made up of divers sums of money paid, laid out, and expended for the defendants, on account of the said bill, and in pursuance of the said promise and agreement:

Held bad, as amounting to the general issue.

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bill of exchange to the said company, and the said company then took and received the same of and from the defendants, and still hold the same for and on account, and as payment of the said sum of 500*l.* so agreed to be lent or paid, laid out, and expended for the defendants as aforesaid; and the defendants say, that the said sum of 500*l.*, parcel, &c., in the introductory part of this plea mentioned, is composed and made up of divers sums of money lent to and paid, laid out, and expended for the defendants, on account of the said bill of exchange, and in pursuance of the said promise and agreement; and this the defendants are ready to verify, &c.

Demurrer, assigning for cause, that the plea amounted to the general issue.

W. H. Watson, in support of the demurrer.—The plea is argumentative, and amounts to the general issue. Supposing the bill to have been given as a security, the money would not be payable until the bill was due. The plea does not shew that the bill has been paid, or that it is over-due. [He was then stopped by the Court.]

Temple, contrd.—The plea admits a debt, but avoids it by shewing the agreement respecting the bill. If there be a single moment when the defendants are indebted to the plaintiff, that is an admission of the implied *assumpsit* to pay on request.

PARKE, B.—By the terms of the agreement, the company were not to advance the money until after the bill was indorsed to them; consequently there never was a promise to pay upon request.

Judgment for the Plaintiff.

LUBBOCK and others v. TRIBE.

The defendant drew his cheque on the Bank of England, and paid it into the hands of the plaintiffs, the bankers of a mining company, to the account of the company. The plaintiffs having lost the cheque, applied to the defendant for another, offering him an indemnity. The defendant agreed to give another cheque.

Held, That an action for money paid would not lie against the defendant for the breach of this agreement, but that the plaintiffs' remedy was by action of special *assumpsit*.

ASSUMPSIT for money paid, and on an account stated. *Plea*.—*Non assumpsit*. At the trial, before Lord Abinger, C.B., at the London Sittings after Michaelmas Term, 1837, the following facts appeared in evidence. The plaintiffs were bankers, in the city of London; the defendant was an attorney. *Henry Tribe*, the brother of the defendant, was the secretary of the *Killewerrie* Mining Company, whose account was kept with the plaintiffs. On the 21st November, 1835, the defendant drew his cheque on the Bank of England, for 100*l.* payable to *Henry Tribe*, who afterwards paid it, on his own account, into the banking house of the plaintiffs, to the credit of the *Killewerrie* mining company. The cheque was lost by the plaintiffs' servants, and was never afterwards found. Upon the discovery of the loss, the following correspondence took place between the plaintiffs and the defendant:

To *Edward Tribe, Esq., 86, Great Russel-street.*

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Sir—On or about the 23d or 24th *November* last, we received, on account of the *Killewerrie* Mining Company, a draft, drawn by you on the bank of *England*, for 100*l.*, in favour of Mr. *Henry Tribe*, dated on one of the above mentioned days, which draft was lost, or accidentally destroyed by us; and notwithstanding we have endeavoured to find it by a diligent search, we have not succeeded. We, therefore, request the favour of your giving a fresh draft, in lieu of it, for the same sum; and hereby indemnify you from all loss which you may sustain by so doing; and beg to thank you for the trouble you have already taken in requesting the Bank of *England*. to stop the missing draft, in case it has been presented.

We are, sir, your most obedient servants,

Lubbock & Co.

To Sir *J. Lubbock & Co.*

Gentlemen,

March 25, 1836.

Your's, of the 24th instant, brings under my notice what had escaped my attention. I am leaving home to day for a short time, and send my book to the bank to be made up; on my return, I shall have the pleasure of handing you a fresh draft, on the terms contained in your letter

I am, gentlemen, your's obediently,

Edw. Tribe.

On the 20th *July*, the plaintiffs wrote to the defendant, stating that they had been called upon by the *Killewerrie* company, to place to their account the sum of 100*l.*, due to them in respect of the cheque. The correspondence between the plaintiffs and defendant continued down to the 17th *May*, 1837, and on the 25th, this action was brought. During the whole of the correspondence, and after the commencement of the action, the defendant promised to pay, but requested indulgence. The particulars of the plaintiffs' demand, dated 8th *June*, 1837, were to the following effect:—"The plaintiffs in this case delivered to you the receipt for the 100*l.*, paid on your behalf to the *Killewerrie* Consolidated Mining Company, on the 21st *November*, 1835; and from this date the company debited the plaintiffs with the amount of this sum, and treated it as paid to them. The plaintiffs delayed to make the entry in their own books, and kept the sum in suspense, until the 21st *April*, 1837, when the credit was finally written into the company's credit, into their own books." The plaintiffs then stated the reason of their so doing. The jury found for the plaintiffs; damages, 100*l.* A rule having been obtained, calling on the plaintiffs to shew cause why this verdict should not be set aside, and a nonsuit entered,

Maule shewed cause.—This is a case in which the jury were justified in finding that the money had been paid to the use of the defendant; for it is a payment made, according to the express direction of the defendant, and discharges a debt for which he was liable.—[Lord *Abinger*, C. B.—The plaintiffs did not pay this sum on account of the defendant, they were themselves under

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an obligation to pay it to the company.]—The plaintiffs were not bound to pay the 100*l.* to the company; they might have disputed the validity of the cheque. But they do pay it, in consequence of the express promise of the defendant to repay them. That promise forms the consideration for the action for money paid.—[*Parke, B.*—There was no antecedent liability on the part of the defendant: the remedy of the plaintiffs is by an action of special *assumpsit*.]—This action can be sustained on the account stated. There is a present obligation to pay the money, together with a positive promise.

Platt, contrd.—The defendant gave the plaintiffs no authority, either express or implied, to pay this money. Nor does it appear that any money ever passed from the plaintiffs to the company. The settlement of accounts between the parties may have been effected by the company being allowed to overdraw their account to the extent of 100*l.* In that case, no action could be maintained on the count for money paid; nor can the plaintiffs succeed upon the account stated, for no debt is due from the defendant to them.—[*Alderson, B.*—Does the letter of the defendant amount to any thing but a promise to perform an agreement. There is no acknowledgment of any antecedent debt.]—The plaintiffs are indebted to the company for the money received from *Henry Tribe*, and the defendant promises that if they will pay that debt, he will repay them. This case falls within the principle of *Spencer v. Parry (a)*, and *Hansard v. Robinson (b)*.

LORD ABINGER, C. B.—We must decide against the right of the plaintiffs to succeed in this form of action. The money sought to be recovered was not paid to the use of the defendant; he was not the debtor of the company; for if they had brought an action against him for this money, he would have discharged himself, by showing that he had paid it to the plaintiffs, as the agents of the company. The plaintiffs themselves were indebted to the company in respect of that sum. It is laid down in the books, that a promise to pay is evidence of an account stated between the parties, the presumption being, that the promise was made on the settlement of accounts. But in this case no debt was due from the defendant to the plaintiffs, and they had nothing beyond a right of action against him for a breach of his contract. The letters of the defendant contain a promise to perform an agreement, and that agreement has been broken.

PARKE, B.—This action is not maintainable, either on the count for money paid, or on the account stated. The money in question was not paid by the plaintiffs to exonerate the defendant from his liability; for as soon as the cheque was paid into their hands, they became answerable to the company for the amount. The correspondence indeed shews an agreement, and on that agreement an action might be maintained. Still, there is no payment of money to the use of the defendant; the money is paid to the bankers, on account of the company. This case falls within the principle of *Spencer v.*

(a) 3 Ad. & Ell. 331; 1 Har. & Woll.
 179; 4 Nev. & Man. 770.

(b) 7 B. & Cres. 90.

Parry. Nor can any action be maintained on the account stated, as that count has reference to money actually due and owing. The plaintiffs must bring their action for the breach of the special agreement.

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BOLLAND, B.—No debt was due from the defendant to the plaintiffs, for which the former was liable in an action for money paid. With regard to the account stated, the rule of law is clear, that that which is relied upon as proving an account stated, must furnish evidence of a subsisting debt.

ALDERSON, B., concurred.

Rule absolute.

MIZEN v. PICK.

DEBT for board and lodging, &c. supplied to the wife of the defendant.
Plea, nunquam indebitatus.

The action was tried in the Palace Court, on a writ of trial. It appeared that the defendant was living apart from his wife, in a state of adultery; that he allowed her a separate maintenance; and that all that portion of it which became due between *November, 1836, to November, 1837*, had been paid. The plaintiff's claim was for necessities supplied to her from *August, 1836, to August, 1837*. It was not proved that the plaintiff had notice of the separate maintenance; and his counsel did not request the judge to ask the jury if the maintenance was sufficient. Upon these facts the plaintiff was nonsuited; with leave to move to enter a verdict for 20*l.*, the amount of the board and lodging, if the Court should be of opinion that the defendant was liable, by reason of the plaintiff's not having had notice of the separate maintenance.

A husband, living apart from his wife, and allowing her a separate maintenance, is not liable for necessities supplied to her. And it is immaterial that the party supplying her has no knowledge of the separate maintenance.

Locke now moved accordingly.—*Rawlins v. Vandyke (a)*, shows that the husband is bound to prove that the tradesman had notice of the separate maintenance. Lord *Eldon, C. J.*, there says, "If the husband gives express notice to a tradesman not to trust his wife, he shall not be charged with goods furnished to his wife; and if a tradesman has notice of a separate maintenance given to the wife, it is the doctrine of Lord *Holt*, that that shall be notice of an express dissent on the part of the husband, and he shall not be charged; but where the tradesman's demand is for necessities, it is incumbent on the husband to shew that the tradesman knew of the separate maintenance."—[*Alderson, B.*—In *Hindley v. The Marquis of Westmeath (b)*, no mention is made of the necessity of notice. Here, the only questions for the jury were, whether the maintenance had been paid, and whether it was sufficient, *Hodgkinson v. Fletcher (c)*. He also cited *Nurse v. Craig (d)*.]—The judge merely left it to the jury to say, whether the sum of 20*l.* was a reasonable charge for board, lodging, and necessities.—[*Gurney, B.*—That was because

(a) 3 Esp. N. P. C. 250.

(b) 6 B. & Cr. 200.

(c) 4 Campb. 70.

(d) 2 Bos. & P. N. Rep. 148.

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you did not request him to ask them if the maintenance was sufficient. That was the main point.]

BOLLAND, B.—This rule must be refused. It was the duty of the counsel for the plaintiff to require the judge to ask the jury if the husband had allowed his wife a sufficient maintenance. We do not think that the decision in *Espinasse's Reports*, is an authority to be relied on against this view of the case.

ALDERSON, B.—The judge directs the jury on a certain state of facts, either proved or admitted; and if he is wrong in assuming the existence of those facts, the counsel should interpose, and set him right at the time. In the present case, the counsel might have required him to ask the jury if the maintenance was paid, or if it was sufficient. And if those facts had been brought to his attention, he would have submitted them to the jury. As it is, he tells them that the payment of a separate maintenance is an answer to the plaintiff's demand. That means, that under the circumstances of this case, the payment of a *sufficient* maintenance, is an answer to the agency of the wife to charge the husband with necessaries.

GURNEY, B., concurred.

Rule refused.

SHARPE v. WAGSTAFFE.

In an action for work and labour as an apothecary, the plaintiff, under the general issue, must prove his certificate, or that he was in practice before the 5th August, 1815.

DEBT for work and labour as a surgeon and apothecary. *Plea: nunquam indebtedatus*, upon which issue was joined.

At the trial before the under-sheriff of *Middlesex*, the plaintiff having given evidence of his claim, it was objected on the part of the defendant, that the plaintiff was bound to produce his certificate as an apothecary, or to prove that he was in practice on or before the 5th of August, 1815. The under-sheriff nonsuited the plaintiff, reserving liberty to move to enter a verdict for 40s.

Thomas having obtained a rule accordingly,

Heaton shewed cause.—This was not a matter of defence to be raised by plea, but a defect of proof in the plaintiff's case, *Morgan v. Ruddock* (a), *Wills v. Langridge* (b), *Shearwood v. Hay* (c). The 21st section of the 55 Geo. 3, c. 194, enacts "that no apothecary shall be allowed to recover any charges claimed by him in any Court of law, unless such apothecary shall prove on the trial that he was in practice as an apothecary prior to or on the 5th day of August, 1815, or that he has obtained a certificate to practise as an apothecary from the Master, Wardens, and Society of Apothecaries as aforesaid. By this Statute the requisite proof is made a condition precedent to the plaintiff's right to recover, *Morgan v. Ruddock*. The

(a) 1 H. & W. 505; 4 Dow. P. C. 311. (b) 5 A. & E. 383; 2 Har. & Woll. 250. (c) *Ibid.*; 2 Har. & Woll. 249.

rule of *H. T. 4 W. 4*, "Assumpsit," orders, that "in all actions of assumpsit, except on bills of exchange, and promissory notes, the plea of nonassumpsit shall operate as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law." This is not a matter in avoidance of the contract, but an essential fact in support of the plaintiff's case.—[*Alderson, B.*—Suppose the declaration were, "*A. B.* who has obtained a certificate as an apothecary," &c. and then for work and labour, would he be obliged to prove at the trial that he was an apothecary, although that allegation was not traversed by the pleadings?—In *Shearwood v. Hay*, Lord Denman, C. J., says, "the Statute requires that before any person shall be allowed to recover charges made by him as an apothecary, he shall prove that he was duly qualified: the undersheriff held, that the qualification was a part of the plaintiff's title to recover, which the Statute made it imperative on him to prove, and I think that ruling was right." In *Field v. Woods (d)*, that the fact of a check being post dated, need not be specially pleaded. In the case of a contract within the Statute of Frauds, the plaintiff must, under the general issue, prove that there was a memorandum in writing.—[*Alderson, B.*—The plea of non assumpsit puts in issue the alleged contract, or the matters of fact from which that contract is to be implied: does the Statute make the certificate one of those matters of fact?—There can be no legal contract between the parties unless the plaintiff has a certificate.—[*Parke, B.*—Surely you will not contend that under a plea of release, or accord and satisfaction, it would be necessary to prove the certificate; you must therefore read the Statute with some qualifying words, such as "that if the certificate shall be put in issue," the plaintiff shall not recover.]—In the case of a plea of release, &c. the contract is admitted, and it is only a collateral matter which is to be tried.—[*Alderson, B.*—If you construe the Act literally, there would be a trial, and consequently the party would be bound to prove his certificate: if the Act be not construed literally, why may not the words "if pleaded so as to put the question in issue" be introduced. In *Potts v. Sparrow (e)* it was held, that the illegality of certain agreements could not be given in evidence under the plea of non assumpsit.]

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Thomas, in support of the rule.—Since the new rules, this is a defence which must be specially pleaded. The Statute enacts that the attorney shall not recover, &c. "unless he shall prove at the trial." What is meant by proof at the trial? Suppose the defendant at the trial says, "I will not require you to prove that you are an apothecary." Would that be proof? If so, it is equally proved by the admission on the pleadings. The argument on the other side must go to this extent, that in all cases it must be absolutely proved as part of the contract. Every Statutable illegality must be pleaded *Barnet v. Glossop (f)*; *Potts v. Sparrow*, is an express authority in favour of the plaintiff. *Beck v. Mordaunt (g)*, decided that in an action on an attorney's bill, the defence that no signed bill was delivered, must be specially pleaded.

Cur. adv. vult.

(d) 2 N. & P. 114, 1 W., W. & D. 482.

(e) 1 Hodges, 135; 1 Bing. N. C. 594; 1 Scott, 578; 3 Dowl. 630.

(f) 1 Hodges, 94; 1 Bing. N. C. 633; 1 Scott, 621; 3 Dowl. P. C. 635.

(g) 1 Hodges, 196; 2 Bing. N. C. 140; 2 Scott, 170; 4 Dowl. 112.

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PARKE, B.—We have considered this case, and we think that being only a Court of co-ordinate jurisdiction, we are bound by the judgment of the Court of *Queen's Bench*, in *Shearwood v. Hay*, and *Wills v. Langridge*, whatever doubts we may feel respecting it. The rule for setting aside the nonsuit must therefore be discharged.

Rule discharged (*h*).

(*h*) See *Johnson v. Dodson*, 2 Mee. & Wel. 653.

CLARKE v. DIGNUM.

In an action by *C.* against *D.*, for 60*l.*, the defendant paid that sum to the plaintiff's attorney; *C.* then sued the attorney for money received to his uses. At the trial, it appeared that *E.* was the real plaintiff in the first action, and that he had made use of *C.*'s name, without his authority; the jury found that the 60*l.* was received for *E.*, in the name of *C.*; *Held*, that *C.* could not recover that sum from the attorney.

ASSUMPSIT for money had and received. *Plea*, *Non assumpsit*, and a set-off for work and labour.

At the trial, before *Gurney, B.*, at the *Middlesex* Sittings after *Hilary Term*, it appeared that an action had been brought against one *Duncombe*, upon a bill of exchange for 60*l.*, and on that occasion *Clarke* was the plaintiff on the record, and the present defendant acted as his attorney. *Duncombe* paid to the defendant the 60*l.*, sought to be recovered. It subsequently appeared, that the real plaintiff in the action was a person of the name of *Edwards*, who was the holder of the bill, but who had used the name of *Clarke* without his consent. The defendant had received all his instructions from *Edwards*, and *Clarke* had in no way interfered. Upon the evidence, it was submitted that the money was *Edwards'*, and not *Clarke's*; and that the defendant was entitled to a verdict. The learned judge left it to the jury to say, whether the money was received for *Clarke* or *Edwards*; and they found it was received for *Edwards*, in the name of *Clarke*. A verdict was found for the plaintiff, with liberty for the defendant to move to enter a verdict for him.

Kelly having obtained a rule accordingly,

Platt shewed cause.—Under the circumstances of the case, the defendant should have pleaded payment.—[*Parke, B.*—The question arises upon the plea of *non assumpsit*. The defendant says that the money was not received for the use of *Clarke*, but for the use of *Edwards*.]—Then, if he has paid it to *Edwards*, there should have been a plea to that effect. The defendant has received the money from *Duncombe*, on behalf of the plaintiff on the record.

PARKE, B.—*Prima facie*, the attorney is the attorney for the plaintiff on the record; but when the real nature of the transaction is inquired, the jury find that *Edwards* is the party entitled to the money, and that *Clarke* is a mere name. There is nothing to prevent the defendant paying the money to *Edwards*.

Rule absolute.

Platt then applied for a new trial upon affidavits.

HEIGH v. JACKSON.

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THIS was an action for money paid. The defendant had drawn a bill of exchange upon a third party, which was accepted by him. The plaintiff, at the defendant's request, indorsed the bill for his accommodation. Before the bill became due, the defendant became bankrupt, and the plaintiff, being compelled to pay the amount to the holder, brought the present action against the defendant.

Petersdorff had obtained a rule to shew cause why the bail-bond should not be delivered up to be cancelled, on the ground that this was a debt proveable under the commission; and that the defendant had obtained his certificate.

Barstow shewed cause.—There is no contract on the bill itself, as between the present plaintiff and the defendant, who are rather in the situation of co-sureties for the holder, and as such, could not have been admitted to prove the debt under the fifty-first or fifty-second sections, *Yallop v. Ebers* (a). There was no debt due from the bankrupt at the time of the bankruptcy, and, for any thing that appeared, the bill would have been duly paid. It is admitted, that the intention of the act was to discharge the bankrupt from all demands against him; yet many cases have arisen in which the act has not had that effect, *Clements v. Langley* (b).

Lord ABINGER, C.B.—The cases referred to arose between co-sureties, but this is a question between surety and principal.

PARKE, B.—I am of the same opinion. In the event of the acceptor not paying the bill, the defendant becomes the principal, and the plaintiff his surety.

Rule absolute.

(a) 1 B. & Adol. C98.

(b) 5 B. & Adol. 372; 2 Nev. & Man. 269.

JONES v. SMITH.

THE defendant being sued as a *feme sole*, pleaded her coverture in abatement; but her residence was not stated with convenient certainty in the affidavit, verifying such plea, as required by the 3 & 4 W. 4, c. 42, s. 8. The plaintiff thereupon signed judgment.

Addison having obtained a rule *nisi* to set aside the judgement for irregularity,

James shewed cause.—The question is, whether this is a plea of non-joinder, within the meaning of the 3 & 4 W. 4, c. 42, s. 8, which enacts, "that no plea in abatement, for the nonjoinder of any person as a co-defend-

A., for the accommodation of *B.*, indorsed a bill of exchange drawn by *B.* upon and accepted by *C.*; before the bill became due, *B.* became bankrupt, and *C.* having made default, *A.* paid the bill, and sued *B.* for money paid:—*Held*, that *A.* was in the situation of a surety to *B.*, and that the certificate was a bar to the action.

A plea in abatement of the coverture of the defendant, is not a plea of non-joinder, within the meaning of the 3 & 4 W. 4, c. 42, s. 8.

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ant, shall be allowed, unless the residence of such person shall be stated with convenient certainty, in an affidavit, verifying such plea." This is, in effect, a plea of non-joinder, because the action cannot be maintained without a joinder of the husband.

Addison, in support of the rule.—The Statute applies only to the case of joint contractors, where the plaintiff may reply, that they were discharged from liability by bankruptcy or insolvency. In the present case no replication could be framed, so as to render the action maintainable against the wife alone, *Barden v. Reverberg* (a).

PARKE, B.—If the eighth section of the Statute be taken in connection with the ninth and tenth, it is evident that the Act applies only to those cases of non-joinder, where the plaintiff might continue the action against the defendant alone. The ninth section enacts, that the plaintiff may reply that the other person named in the plea, has been discharged by bankruptcy or insolvency. This clearly shews that the clause was intended to apply to the case of a co-contractor.

Rule absolute.

(a) 2 M. & W. 64.

FISCHER v. AIDE.

The first count of the declaration stated that the defendant engaged the plaintiff as a courier and travelling servant, for five months certain, at the rate of ten guineas a month; and agreed, that in case she, the defendant, should discharge the plaintiff before the end of the five months, to pay him the fifty guineas, and the expenses of his journey back to *England* or *Paris*.

ASSUMPSIT. The first count of the declaration stated, that heretofore, to wit, on the 17th of *May*, 1837, by an agreement then made between the plaintiff and the defendant, the defendant engaged the plaintiff, as courier and travelling servant, for five months certain, at the rate of ten guineas a month; and agreed, in case she, the defendant, should discharge the plaintiff before the end of the five months, to pay him the fifty guineas, and the expenses of his journey back to *England* or *Paris*. And the plaintiff agreed to serve the defendant with faithfulness, and to do his best and his utmost for the comfort of the defendant and her suite. The declaration then averred mutual promises, and alleged that the plaintiff, in pursuance of the said agreement, entered into the service of the defendant, and continued therein, upon the terms of the said agreement, for two months, and that he was ready and willing to remain in her service for the remainder of the said term of five months:—*Breach*, That the defendant would not continue the plaintiff in her service upon the terms in the said agreement mentioned, but wholly refused so to do; that on the contrary thereof, she, the defendant, after

Averment, that plaintiff entered the service of the defendant, and continued therein for two months, and was willing to remain, but that the defendant discharged him at *Carlsbad*, and refused to pay him the fifty guineas, or his expenses to *England* or *Paris*. Second count, for wages, as the servant of the defendant. *Plea*, as to the first count, except as to 21*l.*, that plaintiff absented himself from the service of the defendant without her consent. Secondly, to the first count, except as to the said sum of 21*l.*, that plaintiff disobeyed the lawful order of the defendant; thirdly, to the second count, except as to 21*l.*, *non assumpsit*. Lastly, payment into Court of 34*l.* 18*s.* The plaintiff joined issue on the first and third pleas, and replied to the second, *de injuriâ*; and to the last, *damages ultra*. The jury found for the plaintiff, on the first and fourth issues; and for the defendant, on the second and third: *Held*, that on this record the plaintiff was entitled to a verdict for nominal damages.

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the plaintiff had served and travelled with the defendant from *England to Carlsbad*, and before the expiration of the term of five months, to wit, on the 17th *July*, 1837, at *Carlsbad*, in *Bohemia*, dismissed and discharged the plaintiff from her service, and then wholly refused to employ him any longer; and the defendant refused to pay the plaintiff the said sum of fifty guineas, or to pay him any sum or sums of money whatever for or towards the expense of his journey back from *Carlsbad to England*, or to *Paris*, contrary to her said agreement and promise; and the plaintiff necessarily and unavoidably incurred, and was put to great expense of his monies, amounting in the whole to 30*l.*, about his journey from *Carlsbad to Paris*, whereof the defendant had notice, &c. &c.

The second count was *indebitatus assumpsit* for 52*l.* 10*s.* for wages, as the hired servant of the defendant, and on her retainer.

Plea: first, as to the first count of the declaration, except as to the sum of 21*l.*, parcel of the said sum of 52*l.* 10*s.*, in the said first count mentioned.

Actionem non; because the plaintiff, during the said term of five months, to wit, at the said time, when, &c., that is to say, on the said 17th day of *July*, 1837, wrongfully and improperly absented himself from, and quitted and left the said service and employ of the defendant, without her consent, and did not at any time afterwards, and during the remainder of the said term of five months, return to the defendant's service, or render her any service: and thenceforward, until the expiration of the said term of five months, wrongfully and improperly absented himself from the service and employ of the defendant, without her consent, although the defendant, during all that time, was ready and willing to receive and continue the plaintiff in her service and employ, upon the terms aforesaid, of which the plaintiff had notice; without this, that the defendant dismissed or discharged the plaintiff from her service, or refused to employ him any longer, as in the said first count mentioned: concluding to the country.

Second Plea: as to the first count, except as to the said sum of 21*l.*, parcel, &c., *actionem non*; because the defendant says, that the plaintiff did not, nor would, while he was such servant of the defendant, and continued in her service as aforesaid, serve the defendant with faithfulness, or do his best or utmost, for the comforts of the said defendant and her suite, as he ought to have done; and the plaintiff, from time to time during that time, and before his said dismissal, neglected and refused so to do, and wilfully and obstinately refused to obey divers lawful and reasonable demands and orders of the defendant, by her to him given, as such servant, and which he ought to have obeyed as such servant, in the capacity aforesaid, and used disrespectful, insolent, and improper language, and behaved in an insolent manner towards the defendant, so then being his employer as aforesaid, and in divers respects misbehaved and misconducted himself, and neglected his duties as such servant, until just before the said time when he was dismissed as aforesaid, and by reason thereof the plaintiff's services became and were of little or no use or value to the defendant, and it became and was necessary to her comfort, &c. that the plaintiff should be dismissed from her service; wherefore the defendant, during the term of the said five months, and before the wages of the plaintiff for the last three months of the said term became due, dismissed and discharged the plaintiff from her service, and refused to employ him any longer, as she lawfully might, for the causes aforesaid, being the supposed breach of promises, &c. *Verification.*

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Third plea, to the second count of the declaration, except as to 21*l.*, parcel of the sum of 52*l.* 10*s.* therein mentioned, *non assumpsit*.

Fourth plea, payment into Court (in the form given by the new rules, as applied to the whole declaration), of the sum of 34*l.* 18*s.*

The plaintiff joined issue on the first and third pleas, and replied to the second, *de injuriâ*; and to the fourth, *damages ultra*; on which replications also issues were joined.

At the trial, before *Parke, B.*, at the *London* Sittings after last *Hilary Term*, the plaintiff had a verdict on the first and fourth issues, and the defendant on the second and third; but leave was reserved to the plaintiff to move to enter a verdict for the plaintiff, for such sum as the Court should think fit; it being contended, that by the plea of payment into Court, the defendant had admitted a contract for a stipulated amount of fifty guineas, and a breach of that contract.

Bompas, Serjt., having obtained a rule to shew cause, why the verdict should not be entered for the plaintiff, either for the sum of 17*l.* 12*s.*, or 7*l.* 2*s.* or for nominal damages,

Erle (with whom was *W. H. Watson*) shewed cause.—Under the first count, the plaintiff could recover only 21*l.* He could not claim to recover another 21*l.* on the second count, for there is no admission on the face of the declaration of two 21*l.*'s being due. If there had been no plea of payment into Court, the plaintiff could not have signed judgment for 42*l.* The Court will take notice, that the different sums claimed may be one and the same debt, *Jourdain v. Johnson (a)*. And they will also notice, that any admission is not an admission of the precise sum due, but only of so much as may be proved. Suppose there had been a judgment by default, and a writ of inquiry, the plaintiff could not recover both those sums.—[*Parke, B.*—The plea to the second count admits some wages to be due, not exceeding 21*l.*; but the difficulty arises upon the plea of payment into Court.]—Before the Statute of *Anne*, the whole of these pleas might have been taken as one plea to the declaration. In *Harvey v. Grabham (b)*, one plea, commencing with a general allegation of *actionem non*, but contained matter expressly confined to the first count, and concluded with a prayer of judgment, whether the plaintiff ought to have or maintain "his aforesaid action thereof." And the record proceeded: "And as to the second count," &c. with matter expressly confined to that count, and prayer of judgment, as before; and it was held, that the first part was a plea pleaded to the first count only, though informally, and was good on demurrer. Here it was clearly the intention to apply the last plea to such parts of the declaration as were unanswered. As this plea is given by the rules of the judges, it may be considered as relieved from the strictness of form required in other cases, and every intendment will be made in favour of it. The payment of money into Court, is only an admission of a claim to the extent of the money paid in. *Finleyson v. Mackenzie (c)*; *Reid v. Dickons (d)*.—[*Parke, B.*—Under the old rule, you could not have

(a) 2 C., M. & R. 564; 1 Gale, 312;
5 Tyrw. 524.

(b) 5 Adol. & E. 61; 2 Har. & Woll.
146.

(c) 3 Bing. N. C. 824; 3 Hodges, 211;
5 Scott, 20.

(d) 5 B. & Adol. 499; 2 Nev. &
Man. 369.

proved payment after action brought, except in mitigation of damages.]—The plea admits the engagements between the plaintiff and defendant, that he served her for two months, and that 21*l.* are due.—[*Parke, B.*—If the plaintiff is entitled to recover for the two months he actually served, and also for the five months, by reason of his improper discharge, then the count contains a double breach; and money having been paid into Court upon that count, both breaches are admitted.]—The difficulty has been caused by the plaintiff, who has permitted inconsistent pleas to be on the record.—[*Parke, B.*—If there had been one *non assumpsit*, and this plea of payment into Court, I should have said that the defendant was entitled to a verdict. But here there is no complete answer to the whole cause of action, without having recourse to the plea of payment.

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The plaintiff's counsel having agreed to accept nominal damages,

PARKE, B., said—all the Court agree in the view already taken, that whether money is paid into Court or not, each issue must be tried by itself. If the plaintiff chooses to leave inconsistent pleas upon the record, he must take the consequences; but if they remain, it is the duty of the judge and jury to try them. Here, the second plea raises an issue on the whole of the first count, except an undefined portion, for services actually performed; that issue being, whether or not the plaintiff was properly dismissed for disobedience of the lawful orders of the defendant. That issue was disposed of in favour of the defendant. But there still remains an indefinite portion of the first count unanswered. Then, upon the second count, the jury find that the defendant was never indebted to the plaintiff, except as to an undefined sum, not exceeding 21*l.* Then comes the plea of payment of money into Court, which admits the cause of action contained in the declaration; but denies that the plaintiff is entitled to recover more than the sum paid into Court. On the true construction of the first count, the claim is not for any particular period which the plaintiff has served; but the real cause of complaint is, that the plaintiff has been discharged without reasonable cause. But even supposing that the count contains enough to entitle the plaintiff to recover for one month, then it must be considered as containing a double breach; and the defendant, by paying money into Court, admits both the breaches: this being an agreement to pay a stipulated sum for a stipulated time; in either view the plaintiff is entitled to recover. Then the record stands thus—there is an undefined portion of the first and second counts unanswered; but as the Court cannot say how much the plaintiff is entitled to recover for that undefined amount, his claims must be reduced to nominal damages.

BOLLAND and ALDERSON, Bs., concurred.

Rule absolute to enter a verdict for the plaintiff for 1*s.*

Bompas, Serjt., and Humfrey, appeared in support of the rule.

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TWEMLOW and others v. ASKEY and another, Assignees of WEBSTER, a Bankrupt.

Where there are several pleas, each must be taken as if it stood alone upon the record. Therefore, where, in *assumpsit*, the defendant pleaded the general issue and also paid money into Court, and a verdict was found for him on the first issue—*Held*, that the admission in the plea, of payment into Court, did not entitle the plaintiff to have a verdict entered for him on the other issue.

ASSUMPSIT. The declaration stated, that before the making of the agreement thereafter mentioned, the plaintiffs were possessed of a certain stone-quarry, and on, &c., agreed with *Webster*, before his bankruptcy, to permit him to take therefrom such quantities of stone as he might require, for the purpose of building a certain church, which he had undertaken to build at a certain price, to wit, &c.; and that *Webster*, before he became bankrupt, agreed to pay for the same; and that, in pursuance of the said contract, he did take therefrom divers large quantities of stone for the said purpose, and was indebted to the said plaintiffs for the same in the sum of 50*l.*, which sum was still due and owing to the plaintiffs. The declaration then stated, that *Webster* afterwards became a bankrupt, and the defendants were chosen his assignees; and that at the time he so became a bankrupt, the church, which he had contracted to build, was unfinished; and that the defendants, after they became such assignees, adopted the said contract of *Webster* to build the said church, and agreed to continue and to fulfil the contract made by *Webster* and the plaintiff, and thereby, as assignees as aforesaid, became and were liable to and bound by all the equities which *Webster* stood under, with respect to the said contracts; and one of which equities was, to pay to the plaintiffs the said sum of 50*l.* for the said stones, which he had so taken from the said quarry of the plaintiffs, and applied to the building of the said church; and thereupon afterwards, in consideration that the plaintiffs would permit the defendants, as assignees, to take such quantities of stone from the said quarry as would be necessary for completing the contract so adopted by them, they promised to pay the plaintiffs the said sum of 50*l.* for the stone taken by *Webster* before he became a bankrupt, and also for such quantities of stone as they, as assignees, should thereafter take, for the purpose of building the said church, and completing the said contract. *Averment*, that they took from the quarry a certain quantity of stone, to wit, &c., and became liable to pay for the same the sum of 25*l.*, which, together with the aforesaid sum, amounted to the sum of 75*l.* in the whole. *Breach*, non-payment of the same, or of any part thereof.

Pleas: *First*, as to the said causes of action, so far as they relate to the supposed promise first mentioned, and whereby it is alleged, that the defendants, as assignees, promised to pay for the said quantities of stone taken by *Webster*, to wit, the sum of 50*l.*, *non assumpsit*. *Second*, as to the residue of the causes of action, payment into Court of the sum of 6*l.* 12*s.* 11*d.* *Replication* thereto, acceptance in satisfaction of that sum.

At the trial, before *Alderson*, B., at the last Assizes for the county of *Stafford*, the jury found for the defendants on the issue raised by the first plea.

R. V. Richards had obtained a rule *nisi* to set aside the verdict, on the ground that the payment of money into Court upon one breach, admitted the

contract alleged in the declaration; and that the finding of the jury on the first issue, was inconsistent with the admission on the record. He referred to *Dyer v. Ashton* (a).

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On the case being called on for argument,

ALDERSON, B., said—The Court having heard the whole question discussed in *Fischer v. Aide* (b), are of opinion, that each plea must be taken separately, and that each must be looked at as if it were the sole plea upon the record. This case cannot be distinguished in principle.

Rule discharged.

(a) 1 B. & C. 3; 2 D. & R. 19.

(b) *Ante*, p. 168.

EMMOTT v. STANDEN.

DEBT for horse-meat, stabling, &c. The declaration contained five counts, claiming the sum of 15*l.* in each; and concluded, that although the defendant paid parcel of the said monies, yet the residue, amounting to 65*l.*, was still due.

Pleas: first, as to all the monies in the declaration mentioned, except as to 10*l.* 13*s.*, parcel, &c., *nunquam indebitatus*; secondly, as to 10*l.* 13*s.* payment; thirdly, as to 10*l.* 13*s.*, the defendant says, that the plaintiff ought not further to maintain his action in respect thereof, because the defendant now brings into Court the sum of 10*l.* 13*s.*, ready to be paid to the plaintiff; and the defendant further says, that he is not indebted to the plaintiff in a greater amount than the said sum of 10*l.* 13*s.* in respect of the causes of action in the declaration mentioned, so far as the same causes of action relate to the said sum of 10*l.* 13*s.*, parcel, &c.

Replication, that the plaintiff, inasmuch as he admits that the defendant never was indebted to him in respect of the debt in and by the declaration demanded, to a greater amount than the said sum of 10*l.* 13*s.* paid into Court, he freely here in Court accepts the said sum of 10*l.* 13*s.* in full satisfaction and discharge of the debt, in and by the declaration demanded, and of all damages by him the plaintiff sustained, by reason of the detention thereof, &c.

The particulars of demand gave credit for 10*l.* 13*s.*, and claimed a balance of 12*l.* 19*s.* 6*d.*

The defendant having signed judgment of *non pros*,

F. V. Lee obtained a rule to set aside the judgment, for irregularity. He referred to *Coates v. Stevens* (a).

N. R. Clark shewed cause.—The case is distinguishable from *Coates v. Stevens*, because there the money was paid into Court generally upon the

A declaration in debt, contained five counts, for 15*l.* each, and giving credit for parcel of the monies, claimed a balance of 65*l.* The particulars gave credit for 10*l.* 13*s.*, and claimed a balance of 12*l.* 19*s.* 6*d.* The defendant pleaded *nunquam indebitatus*, except as to 10*l.* 13*s.*, parcel, &c. Secondly, as to 10*l.* 13*s.* payment. Thirdly, as to 10*l.* 13*s.* payment of that sum into Court, in discharge of the causes of action in the declaration mentioned; to which the plaintiff replied, by accepting the sum paid into Court: *Et id*, that the defendant was entitled to sign judgment of *non pros*, for want of an answer to the other pleas.

(a) 2 C., M. & B. 118; 2 Gale, 75; 3 Dowl. P. C. 784; 5 Tyrw. 764.

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whole declaration. Here the payment applies to a part only, and the pleas to the other part are wholly unanswered. It is clear, from the case of *Ernest v. Brown* (b), that the defendant was obliged to plead payment, notwithstanding the admission in the particulars. *Topham v. Kidmore* (c), is precisely in point.

Lee, contra.—It would seem, from the case of *Coates v. Stevens*, that where the action is brought for the balance of an account, it is unnecessary to plead a payment admitted by the particulars.—[*Parke, B.*—This plea of payment into Court, is irregular in form; but in truth, it professes to answer only 10*l.* 13*s.* of the demand. The plaintiff has brought all the difficulty on himself, by claiming 85*l.*, when only 22*l.* 11*s.* 6*d.* was due. The pleas of *nonquam indebitatus*, and payment, are unanswered; they must be got rid of, or the defendant is entitled to sign judgment of *non pros.*]—The defendant ought to have resisted the taxation of costs by the plaintiff.

Per Curiam.—The defendant could not have resisted the taxation of costs, because the plaintiff was entitled to costs in respect of the payment of money into Court. The result is, that the judgment is regular. The case differs from *Coates v. Stevens*; because there the payment into Court applied to the whole declaration; but it resembles *Topham v. Kidmore*.

Rule discharged.


(b) 3 Bing. N. C. 674; 3 Hodges, 79; (c) 5 Dowl. P. C. 676; 1 W. W., & 4 Scott, 385. D. 341.

ATTORNEY GENERAL v. PICKARD.

A., by his will, devised certain manors, hereditaments, and tenements, to certain tenants for life, in succession, with a power to each of them, when in possession, to charge the estates by will, with an annuity in favour "of any woman with whom they might respectively have intermarried." Some time after the death of the testator the estates descended upon a tenant for life, who exercised this power of appointment in favour of his wife: *Held*, that this annuity was liable to legacy duty.

INFORMATION against the defendant for legacy duties, claimed to be payable under the will of *John Trenchard*, deceased. The first count of the information stated, that on the 4th of December, 1815, *John Trenchard* duly made his last will and testament in writing, according to the form of the Statute in such case made and provided, and thereby gave and devised certain manors, hereditaments, and premises, in the said will first mentioned, and therein more particularly described, unto *Francis John Browne* and the Rev. *John Morton Coulson*, their heirs and assigns, to the several uses, upon and for the several trusts, intents, and purposes, and under and subject to the several powers, provisoes, conditions and declarations thereafter limited, declared, expressed, and contained of and concerning the same, that is to say (amongst other things, and subject and chargeable to certain annuities in the said will particularly mentioned), to the use of *William Trenchard*, and his assigns, for and during the term of his natural life; and from and immediately after the determination of that estate by forfeiture or otherwise, in the life time of the said *William Trenchard*, to the use of the said *Francis John Browne*, and *John Morton Coulson*, and their heirs, during the natural life of him the said *William Trenchard*, in trust, to support the contingent uses and estates thereafter limited, &c.; and from and immediately after the decease of him the said *William Trenchard*, to the use of the first, second, third, fourth, and every other son of the said *William Trenchard*, lawfully to be begotten, severally,

successively, and in remainder, one after another, in order and course as they respectively should be in seniority of age, and of the heirs male of the respective bodies of such sons respectively; and for default of such issue, to the use of his nephew, *Thomas Pickard*, and his assigns, for and during the term of his natural life (with remainder to trustees, to preserve as before, and with remainders in tail to his issue, as before); and for default of such issue, to the use of his nephew, the Rev. *George Pickard*, clerk (the defendant), and his assigns, for and during the term of his natural life (with remainder to trustees to preserve, as before), with divers other limitations over in the said will particularly mentioned; and the said testator also, by his said will, gave and devised certain other manors, hereditaments, and premises, in the said will secondly mentioned, and therein particularly described, unto the said *Francis John Browne* and *John Morton Coulson*, their heirs and assigns, to the several uses, upon and for the several trusts, intents, and purposes, and under and subject to the several powers, provisoes, conditions, and declarations thereafter limited, declared, expressed, and contained, of and concerning the same; that is to say, (amongst other things) as to all that his advowson, donation, and right of patronage and presentation, in and to certain rectories and parishes therein mentioned and particularly described, to the use of them the said *Francis John Browne* and *John Morton Coulson*, their executors, administrators, and assigns, for the term of ninety-nine years, to be computed from the day of his decease, upon the trust therein mentioned; and as to the said advowsons and hereditaments comprised in the said term of ninety-nine years, from and immediately after the expiration or other sooner determination of the said term, and in the meantime subject thereto, and to the trusts thereof; and as to all other the said manors, hereditaments, and premises, secondly above devised, whereof no use was thereinbefore declared, to the use of his said nephew *Thomas Pickard*, and his assigns, for and during the term of his natural life (with remainder to trustees to preserve, and with like remainders in tail, as before), and for default of such issue, to the use of his said nephew *George Pickard*, and his assigns, for and during the term of his natural life (with remainder to trustees to preserve), with divers other limitations over, in the said will particularly mentioned. And the said testator, by his said will further provided and declared, that it should be lawful for the several persons, who for the time being should, by virtue of any of the limitations thereinbefore contained, be in the actual possession, or entitled to the rents, issues, and profits of the said manors, hereditaments, and premises thereinbefore firstly and secondly devised as aforesaid, or any of them, or any part or parts thereof, by any deed or deeds, instrument or instruments in writing, with or without power of revocation, to be by them respectively sealed and delivered in the presence of, and to be attested by, two or more credible witnesses, or by their respective last wills and testaments, in writing, or any codicil or codicils thereto, to be by them respectively signed and published, in the presence of, and to be attested by three or more credible witnesses, to grant, limit, or appoint unto any woman or women respectively, with whom they should respectively have been married, or should respectively intermarry, for the life or lives of such woman or women respectively, and for her or their jointure or respective jointures, and in bar or without being in bar of her or their dower or respective dowers any annual sum or yearly rent-charge, annual sums or yearly rent-charges, not exceeding

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in the whole the annual sum thereafter mentioned; that is to say, as to his said manors, hereditaments, and premises therein firstly devised, as hereinbefore mentioned, any annual sum or yearly rent-charge, not exceeding 250*l.*, and as to his manors, hereditaments, and premises therein secondly devised, as hereinbefore mentioned, any annual sum or yearly rent-charge, not exceeding 500*l.*; for the life or lives of any such woman or women respectively; such annual sums or yearly rent-charges to be issuing and payable out of, and to be respectively charged and chargeable upon all or any part or parts of the said manors, hereditaments, and premises, firstly and secondly devised as aforesaid, to be clear of all parliamentary and other taxes and deductions whatsoever, to be paid quarterly or half-yearly, at such days or times, and in such manner, and with such powers and remedies by distress and entry upon, and perception of the rents, issues, and profits of the respective hereditaments which should be charged therewith, as the person or persons respectively exercising the said power should think fit, and should in manner thereinbefore mentioned, direct or appoint, as by the said will, reference being thereto had, would appear. The information then stated, that afterwards, and in the lifetime of the said *John Trenchard*, to wit, on the 1st of *January*, 1819, the said *William Trenchard*, in the said will mentioned, died without issue, and that the said *John Trenchard* afterwards, and after the 31st of *August*, 1815, to wit, on the 1st day of *January*, 1820, died, without altering or revoking his said will, as to the premises hereinbefore mentioned, leaving the said *Thomas Pickard* and the said *George Pickard*, in the said will respectively mentioned, him surviving; and thereupon the said *Thomas Pickard*, under and by virtue of the said will, and of the said limitations therein contained, entered into and upon the manors, &c., by the said will firstly devised, and also into and upon the manors, tenements, and hereditaments by the said will

- secondly devised, and unto the receipt of the rents and profits thereof respectively, and remained and continued in such possession, and in the receipt of the said rents and profits respectively, from thence continually until the time of his decease, as hereinafter mentioned, under and by virtue of the said will, and of the said limitations therein contained as aforesaid; that the said *Thomas Pickard* afterwards, and whilst he was in such possession, and in receipt of the said rents and profits as aforesaid, to wit, on the 6th day of *November*, 1829, made his last will and testament in writing, signed, sealed, published, and declared by him, the said *Thomas Pickard*, in the presence of and attested by three credible witnesses, and thereby, in pursuance and by virtue of the power in that behalf given to and vested in him by the said will of the said *John Trenchard*, he did appoint unto and to the use of *Harriet Pickard*, then being the wife of the said *Thomas Pickard*, and to whom he had been and then was married, one annual sum or yearly rent-charge of 250*l.*, of lawful money of *Great Britain*, during her natural life, the same to be issuing and payable out of, and charged and chargeable upon all and every of the manors, messuages, farms, lands, tenements, and hereditaments, by the said will of the said *John Trenchard*, firstly devised and limited as hereinbefore mentioned, and which the said *Thomas Pickard* had thereby power so to charge; and he thereby also appointed unto and to the use of his said wife, *Harriet*, one other annual sum or yearly rent-charge of 500*l.* of like lawful money, during her natural life, the same to be issuing and payable out of, and charged and chargeable on all and every of the manors, by the said will of the

said *John Trenchard*, secondly devised as hereinbefore mentioned, and which he had thereby power so to charge; and the said *Thomas Pickard* thereby directed and appointed that the said two several annual sums or yearly rent-charges of 250*l.* and 500*l.* respectively, should be paid to his said wife and her assigns, at or in the common dining-hall of *Lincoln's-inn*, in the county of *Middlesex*, by equal quarterly payments, clear of all parliamentary and other taxes and deductions whatsoever, the first of such quarterly payments to be made at the expiration of three calendar months next after the decease of the said *Thomas Pickard*, as by the said will of the said *Thomas Pickard*, reference being thereto had, would more fully appear; that the said *Thomas Pickard* afterwards, and more than four years before the exhibiting of this information, to wit, on the 1st of *September*, 1830, died without issue male, and without altering or revoking his said will, as to the said appointment hereinbefore mentioned, leaving the said *Harriet Pickard* and the said *George Pickard* respectively him surviving; and thereupon afterwards, and more than four years before the exhibiting of this information, to wit, on, &c., the said defendant, *George Pickard*, entered into and upon the said manors, tenements, and hereditaments, by the said will of the said *John Trenchard* firstly and secondly respectively devised, as hereinbefore mentioned, and into and upon the possession thereof, and then became, and was and thence continually hath been so possessed and entitled to the said several manors, &c., according to, and under and by virtue of the said will of the said *John Trenchard*, and of the limitations therein contained, subject to the said legacies, by way of annuities, so appointed to be paid to the said *Harriet Pickard* as aforesaid; that the said *Harriet Pickard* was a stranger in blood to the said first-mentioned testator, and that at the time of the death of the said *Thomas Pickard*, to wit, on, &c., the said *Harriet Pickard* was of the age of 66 years, and no more, and also that the value of the said two legacies, so given by the way of annuities to the said *Harriet Pickard* as aforesaid, according to the Statute in such case made and provided, then and there amounted in the whole to a large sum of money, to wit, the sum of 5,616*l.*, and also that the duties which should and ought to have been paid for and in respect of the said bequest to the said *Harriet Pickard*, then and there amounted to a large sum of money, to wit, the sum of 561*l.* 4*s.*: that the said defendant, *George Pickard*, having entered into and become possessed of the rents and profits of the said several manors, &c., hereinbefore mentioned, and entitled to the same as aforesaid, subject to the said bequests to the said *Harriet Pickard*, heretofore, and before the exhibiting of this information, did pay and satisfy unto the said *Harriet Pickard* the said annuities so appointed to the said *Harriet Pickard* as aforesaid, for and during the space of four years next succeeding after the death of the said *Thomas Pickard*, to wit, on the several days and times, and by the payments in that behalf directed and appointed as aforesaid, without having received or deducted the duty chargeable thereon as aforesaid, the said duty not having been first duly paid to his Majesty, whereby and by force of the Statute in such case made and provided, the said defendant, *George Pickard*, so being entitled to the said several manors, tenements, and hereditaments as aforesaid, subject to the said last-mentioned legacies, became and was, and still is liable to pay to his said Majesty the said sum of 561*l.* 4*s.*, being the amount of the said duty so due and payable in respect of the said legacies.

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The *second* count was for penalties for paying the annuities without taking proper stamped receipts; the *third* was in *indebitatus assumpsit*, for duties; and the *fourth*, on an account stated.

The defendant demurred to the first count, and to the others pleaded *nil debet*.

The points for argument, on the part of the defendant, were as follows:—The defendant contends, that as Mrs. *Pickard*, the jointress, was not an object of the bounty of the testator, *John Trenchard*, the legacy duty does not attach; that the case is neither within the letter nor the spirit of the Legacy Duty Acts, as Mrs. *Pickard* is neither specially named or described in the will of *John Trenchard*.

The Attorney-General's points for argument, were as follow:—The Attorney General claims the payment of duty under the 55 *Geo.* 3, c. 184, sched. part 3, title *Legacy*; 45 *Geo.* 3, c. 28, ss. 4 and 5; and 36 *Geo.* 3, c. 52, s. 8; and intends to argue,—

First, That Mrs. *Harriet Pickard*, the appointee of the powers created by the will of *John Trenchard*, took the annuities, in the first count mentioned, by the gift of *John Trenchard*; and

Secondly, That the defendant is the person chargeable with such duty, he being entitled to the real estate in the first count mentioned, subject to the said annuities.

The demurrer was argued in *Hilary Term*, by

Erle, for the defendant.—The defendant is not liable to pay legacy duty in respect of the rent-charge to Mrs. *Pickard*. The original testator grants estates for life to divers persons in succession, and annexes to such estates a power of granting a rent-charge in favour of any woman or women with whom they might intermarry, if such woman or women should survive them. That which passes from the testator is not a gift of money; but he gave to each tenant for life a power of raising a rent-charge, and deducting it out of the estate of the succeeding tenant for life. Under these circumstances, the question is, whether legacy duty is payable to the Crown on those rent-charges under the 55 *Geo.* 3, c. 184, sched. part 3, tit. *Legacies*. The words are, “for every legacy, specific or pecuniary, or of any other description, of the amount or value of 20*l.* or upwards, given by any will or testamentary instrument, of any person who shall have died after the 5th day of *April*, 1805, either out of his or her personal or moveable estate, or out of or charged upon his or her real or heritable estate, or out of any monies to arise by the sale, mortgage, or disposition of his or her real or heritable estate, or any part thereof, and which shall be paid, delivered, retained, satisfied or discharged after the 31st day of *August*, 1815,” the respective duties therein mentioned. It further states, that “all gifts of annuities, or by way of annuity, or of any other partial benefit or interest out of any such estate or effects as aforesaid, shall be deemed legacies, within the intent and meaning of this schedule.” The words being, “any legacy, specific or pecuniary,” it is material to see whether by the will, any gift of money was made. Now, here there was no present gift of money, but only the grant of a power to create a rent-charge. The 750*l.* is not given by the testator, but is ultimately taken out of the real estate by the tenant for life for the time being.

But further, the 45 Geo. 3, c. 28, ss. 4 & 5 (a), and 36 Geo. 3, c. 52, s. 7 (b), are relied upon by the Crown, as giving the right to duties in this case. The intent of both these Statutes plainly was, to lay the duty on the money received from the testator, and that it should be levied on the party receiving it. But here the attempt is to levy the tax, not upon a donee of the testator, but upon a person standing in a totally different situation. If it be true that the duty attaches wherever there is a power to create the annuity, the children of the marriage would be equally liable to the duty.

The cases which have been decided on this subject shew that this is not a gift of any money, nor a gift by the testator to this party. In the *Attorney General v. Jackson* (c), a testator gave a life estate in his freehold property to C. T., and after her decease, and in the event of her husband, J. T., surviving her, he gave an annuity or yearly rent-charge of 500*l.*, payable quarterly, with such power of remedy of distress and entry, and perception of rents, in case the annuity should be in arrear, as are reserved to the lessors for the recovery of rents on leases for years; and subject to that annuity he gave his real estates, in moieties, to R. J. in fee, and to H. J. for life; it was held, that legacy duty was payable upon the devise to J. T. by R. J. and H. J. But there the testator himself named the sum to be paid out of his

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(a) Section 4. "Every gift, by any will or testamentary instrument of any person dying after the passing of this Act, which, by virtue of any such will or testamentary instrument, shall have effect or be satisfied out of the personal estate of such person so dying, or out of any personal estate which such person shall have power to dispose of, or as he or she shall think fit, or which shall have been charged upon or made payable out of any real estate of the person so dying, or which such person may have the power to dispose of, whether the same shall be given by way of annuity or in any other form, shall be deemed and taken to be a legacy, within the true intent and meaning of this Act: Provided always, that nothing herein contained shall be construed to extend to the charging with the duties by this Act granted, any specific sum or sums of money, or any share or proportion thereof, charged by any marriage settlement, or deed or deeds, upon any real estate, in any case in which any such sum or sums, or share or proportion thereof, shall be appointed or apportioned by any will or testamentary instrument, under any power given for that purpose by any such marriage settlement, deed or deeds."

Sec. 5. "And be it further enacted, That the duties hereby granted on legacies, or charged upon or made payable out of any real estate, or out of any monies to arise by the sale of any real estate, or upon residues, or parts or shares of residues of any such monies, shall be accounted for, answered, and paid by the trustee or trustees to

whom the real estate shall be devised, out of which the legacy or legacies, or share or shares of any money, arising out of the sale or mortgage, or other disposition of such real estate, shall be to be paid or satisfied; or if there shall be no trustees, then by the person or persons entitled to such real estate, subject to any such legacy, or by the person or persons empowered or required to pay or satisfy any such legacy."

(b) Sec. 7. "And be it further enacted, That any gift by any will or testamentary instrument of any person dying after the passing of this Act, which shall, by virtue of any such will or testamentary instrument, have effect or be satisfied out of the personal estate of such person so dying, or out of any personal estate which such person shall have power to dispose of, as he or she shall think fit, shall be deemed and taken to be a legacy, within the intent and meaning of this Act, whether the same shall be given by way of annuity, or in any other form, and whether the same shall be charged only on such personal estate, or charged also on real estate of the testator or testatrix, who shall give the same, except so far as the same shall be paid or satisfied out of such real estate, in a due execution of the will or testamentary instrument by which the same shall be given; and every gift which shall have effect as a donation *mortis causa*, shall also be deemed a legacy within the intent and meaning of this Act."

(c) 2 C. & J. 101.

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estates, and the individual to whom it should be paid; and the only ground upon which it was contended that the gift was exempt from legacy duty was, that it was a devise of real interest, and not an annuity within the meaning of the Acts. The same observations apply to *Stow v. Davenport* (d), which was similar in its circumstances; the only difference being, that the tenant for life had a discretionary power to limit the amount of the charge to the extent of 500*l*. So also in *Hales v. Freeman* (e), the object of the bounty was specified. It will be argued on the other side, that the instrument executing the power, is to be considered as part of the instrument creating the power, and that this, therefore, must be taken as part of the will of the testator; but there are several authorities to shew that such instruments are separate and distinct, when executed at different times, and under different circumstances, *Bartlet v. Ramsden* (f); *Hurd v. Fletcher* (g); *Scrafton v. Quincey* (h); *Duke of Marlborough v. Lord Godolphin* (i). The widow of *Thomas Pickard* takes under the will of her husband, who makes a gift to her of 750*l*. a year; how can she be said to have received that from *John Trenchard*, to whom she was a perfect stranger, and who died many years before? No argument can be drawn, in support of the claim, from the 18th section of the 36 *Geo.* 3, c. 52 (j), as that does not relate to charges on land, but only to legacies given, subject to powers of appointment for the benefit of persons who shall be specially named or appointed as objects of such power. This is not the case of a legacy given for a limited interest, with a power of appointment among objects specifically named, but it is a devise of a freehold interest in land, with a power of granting a rent-charge out of it; and it is submitted, that legacy duty does not attach, on such power being exercised.

(d) 5 B. & Adol. 359.

(e) 1 B. & B. 391.

(f) 1 Keb. 750.

(g) Doug. 43.


(h) 2 Ves. sen. 413.

(i) *Ibid.* 61.

(j) Sec. 18. "And be it further enacted, That where any legacy, or the residue, or any part of the residue of any personal estate, shall be subjected to any power of appointment to or for the benefit of any person or persons specially named or described as objects of such power, such property shall be charged with duty, as property given to different persons in succession; and in so charging such duty, not only the person and persons who shall take previous or subject to such power of appointment, but also any person or persons who shall take under, or in default of any such appointment, when and as they shall so take respectively, shall, in respect of their several interests, whether previous, or subject to or under, or in respect of such appointment, be charged with the same duty, and in the same manner, as if the same interest had been given to him, her, or them respectively in and by the will and testamentary disposition containing such

power, in the same order and course of succession as shall take place under and by virtue of such power of appointment, or in default of execution thereof as the case may happen to be; and where any property shall be given for any limited interest, and a general and absolute power of appointment shall also be given to any person or persons to whom the property would not belong in default of such appointment, such property, upon the execution of such power, shall be charged with the same duty, and in the same manner, as if the same property had been immediately given to the person or persons having and executing such power, after allowing any duty before paid in respect thereof, and where any property shall be given with any such general power of appointment which property, in default of appointment, will belong to the person or persons to whom such power shall also be given, such property shall be charged with and shall pay the duty by this Act imposed, in the same manner as if such property had been given to such person or persons absolutely in the first instance, without such power of appointment."

The *Solicitor General*, for the Crown.—This case turns upon the construction of the 36 *Geo.* 3, c. 52, s. 7, and the 45 *Geo.* 3, c. 28, s. 7. It does not alter the nature of the case that this is a gift of real estate to the successive tenants for life. On a gift of land, there is no legacy duty; but whenever a charge upon land comes into *esse*, then the legacy duty attaches upon that charge. The real question therefore is, whether this is a charge upon land within the meaning of these Statutes. Suppose that, instead of a gift of real estate, there had been a gift to trustees of personal estate, upon trust, to pay the rents, or annual proceeds, to *William Trenchard* for life, with remainder to his children, then with remainder to *Thomas Pickard* for life, and after his death to his children, with power to *Thomas Pickard* to appoint to his wife 750*l.*; could it be contended that that sum would not be a gift of money, subject to legacy duty? But it is said, that this is not a gift which the party takes by virtue of a testamentary instrument, but that he takes it by virtue of the will and an act done afterwards, namely, the instrument executed by *Thomas Pickard*; it is, however, taken under the will, according to the true intent of the Statute. Cases have been referred to, to shew that for many purposes, the act of executing the power is a separate act; but in order to ascertain whether the two are to be attached or not, the whole nature of the transaction must be looked at. Suppose a party was desirous of providing for all the children of *A. B.*, could he avoid the legacy duty, by making a gift to them, if *A. B.* should think fit that they should take it. There would be little room for doubt, if the case rested entirely on the 7th section of the 36 *Geo.* 3. But the 18th section exhausts every possible case of appointments under power; only three instances of a power of appointment can be suggested. First, a person may have a limited interest with a power subject to that interest, to appoint to certain restricted classes; secondly, a person may have a limited interest, with an absolute power of appointment, as the devisee may think fit; and thirdly, a person may have a limited interest, and another person may have the power of appointment. Then, the former clauses having provided for the payment of duty, where the legacies are given in succession, the 18th section enacts, “that when any legacy, or the residue, or any part of the residue of any personal estate, shall be subjected to any power of appointment to or for the benefit of any person or persons specially named or described as objects of such power, such property shall be charged with duty, as property given to different persons in succession.” It cannot be the meaning of the Act, that the individual must be named by the testator; the words “specially named or described as the objects of such power,” mean only persons who fill a particular character, such as the wife or children. The meaning of the section is, that the duty shall be charged, just as if there had been a gift to *Thomas Pickard* for his life, with remainder, as to 750*l.* a year, to his wife for her life, without any power, remainder to children, if there had been any, with remainder over. Suppose personal estate were bequeathed to a member of the royal family (who are exempt from legacy duty), with a power to appoint an annuity to any servant of his, and he were to appoint an annuity of 750*l.* a year, could it be doubted that such a case would fall within the 18th section of the 36 *Geo.* 3, c. 52. The cases of the *Attorney General v. Jackson*, and *Stow v. Davenport*, clearly shew that the same principle applies, whether the power is to appoint out of personal or real estates.

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—[Lord Abinger, C. B.—I think the real question is, whether this is not the creation of a charge by *Pickard*.]

Erle, in reply.—It is impossible to consider this as a devise by *John Trenchard* to *Harriet Pickard*; the gift is to trustees, one after another. The defendant may argue, that on *Thomas Pickard* becoming actual tenant for life of this property, he might have entered into a treaty with his wife as to the terms on which he would exercise this very power of jointuring, and that her relatives might have advanced a considerable sum in consideration of the grant of the charge of 750*l.*; and she would then, to all intents and purposes, be a *bonâ fide* purchaser of the rent-charge, for its value; could the crown afterwards say, “You are in the receipt of a gratuitous gift of 750*l.* per annum, from a stranger in blood, and that therefore, ten per cent. is to be charged upon the total value.” If the 18th section is to be made applicable, a great hardship would arise. The 5th section of the 45 *Geo.* 3, enacts, “That where the duty charged, within the meaning of that Statute, cannot be obtained from the trustee or his heirs, the tenant may be resorted to.” Now, the defendant here, who is the succeeding tenant for life, is intended by the testator to have the whole use and benefit of the annuity, minus the 750*l.* which the preceding tenant for life is enabled to charge for the benefit of his widow. This is a devise of real property, with a power to different tenants for life to create a rent-charge, and as one of those tenants gives a sum of money to his wife, that operates upon the original title, and is a gift out of real property, and exempted from legacy duty. The testator not having named the party to take under that power, it cannot be said that an individual, so taking, is a legatee of the original testator.

Cur. adv. vult.

In this Term the judgment of the Court was delivered by

LORD ABINGER, C. B.—This was an information filed by the Crown, for the purpose of recovering legacy duties; and the question upon the demurrer arose upon these facts:—By the will of a gentleman, whose name was mentioned in the pleadings, there was a power to each tenant for life, in succession, to charge the estates with certain annuities, amounting altogether to 750*l.* a year, by way of jointure. It seems that the estate came into the hands of *Mr. Pickard*; and the question was, whether this charge is liable to legacy duty. The case was ably argued on both sides; and we are of opinion that the Crown is entitled to judgment on this demurrer. There can be no doubt that an annuity is, by the definition in the *Legacy Act*, a legacy. The question is, whether this annuity, or legacy, must be considered as charged upon the real estate by the testator, who exercised that power. Nothing can be better settled than the general rule, that interests created by the execution of a power, take effect precisely in the same manner as if created by the instrument which gives that power. This was admitted by the defendant's counsel in argument; but he contended that there were exceptions to this rule, which, he said, was at best but a fiction of law; and that, whenever the substantial ends of justice required it, an exception should take place. But the only exceptions to the general rule are, first, where the question of time becomes important: thus, in the case of *The Duke of Marlborough v.*

Lord Godolphin, it was held by *Lord Hardwicke*, that the person taking, by execution of a power, whether realty or personalty, takes under the authority of that power, and in the like manner, as if his name and interest had been specified in the instrument giving the power; but not from the date of the power. Thus, *Lady Sunderland*, who had a power, by the will of her husband, to appoint by her own last will and testament, the sum of 30,000*l.*, in which she had an interest for life, to such of his children as she thought proper, having, by her will, appointed portions amongst the children, of whom two died in her lifetime; it was held by *Lord Hardwicke*, that there was no appointment whatever respecting these; and that she must be taken so to have intended, as she did not, upon her death, alter her will. In that case, therefore, the children who did take under the power, took in the like manner as if they had been appointed by their father's will creating the power, to take their respective shares upon the death of *Lady Sunderland*.

The second exception is, when the instrument executing the power has not been duly registered, the land being in a register county, to avoid mesne incumbrances; that was the case of *Scrafton v. Quincey*, where a party having executed by deed a power to charge his lands, afterwards, and before the deed was registered, granted a mortgage of the lands, to secure money borrowed. It was held, by the Master of the Rolls, that the case was precisely within the terms of the Register Act, and was a question of priority between two incumbrances.

The third case of exception, is that of an execution of a power to convey lands, under such circumstances as to make the conveyance fraudulent under the Statute of *Elizabeth*. This is said, by counsel, *arguendo*, in 2 *Vesey*, 65, to have been considered by *Lord Hardwicke* as a conveyance of lands within that Statute; but this is only to say, that a man cannot so execute his power to convey his lands, as to commit a fraud upon his creditors, if he be a trader, or upon a *bonâ fide* purchaser for value.

These two last exceptions are obviously founded upon justice, and mean no more than this; that as the time when the power is to take effect need not be specified in the instrument creating it, the instrument which executes it may be considered as distinct, for the purpose of avoiding fraud, or preventing the evasion of an Act of Parliament. But this exception, neither in form nor in principle, has the least resemblance or relation to the present case; and as there is nothing in the Statute which imposes the duty upon legacies charged upon land, to shew that any thing more or less is meant by those words than their ordinary signification, it appears to us, that the annuity in this case, being a legacy, was charged upon the real estates mentioned in the pleadings, by the will which created the power to charge, in like manner as if the person to whom it was given by the execution of the power had been mentioned by name, as the object of the testator's bounty, in the will which gave the power. We think, therefore, that the judgment ought to be for the Crown.

Judgment for the Crown.

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IN THE EXCHEQUER CHAMBER.

(In Error, from the Court of Exchequer.)

Exch. Chamber.

MUSPRATT v. GREGORY.

A boat was sent by the owner to certain salt works belonging to a salt manufacturer and left a reasonable time in a canal on the premises, for the purpose of being loaded with salt: Held, that the boat was not privileged from distress.

Goods of a stranger on the land may be distrained for a rent-charge issuing out it.

A WRIT of error having been brought on the judgment of the Court of Exchequer (a), the case was argued by *Crompton*, for the plaintiff, and *W. H. Watson*, for the defendant; but as the arguments did not substantially differ from those in the Court below, it is considered unnecessary to repeat them.

Cur. adv. vult.

The judgment of the Court was now (May 8th) delivered by

Lord DENMAN, C.J.—We are of opinion that the judgment of the Court of Exchequer, in this case, ought to be affirmed.

The rule is admitted to be general, that all moveable chattels found upon the land chargeable with distress, are, *primâ facie*, liable to be distrained. To this rule, certain exceptions have been established; some for the benefit of trade or husbandry, and some for the preservation of the peace. And the question now is, whether the present case falls within any of those exceptions, for if not, the general rule must prevail.

It is admitted that there is no decided case which is expressly in favour of the privilege claimed; and on the other hand, there is none expressly against it. Any minute examination, therefore, of the various cases which have been cited, would be an unprofitable occupation; but taking the above admission, made in the Court below, to be correct, the burthen is cast upon the plaintiff of shewing, that the exemption for which he contends is, by fair analogy, comprehended within some class of circumstances, to which the exemption contended for, has been conceded.

It is said, that the principle of exemption is the public good. But this is the principle upon which all laws are professedly formed. What is, or is not, for the public good, is a matter of speculation, upon which the wisest men may differ, and upon which the judges are not at liberty to promulgate any new rule of law.

That the particular exceptions specified in *Co. Lit.* and other books, are put by way of example, is fully admitted. This very plainly appears, from the use of the expression, "and the like;" consequently, when the examples specified do not strictly apply to any particular case, but the circumstances of it are *ejusdem generis*, the same privilege may be justly claimed.

We have, therefore, to inquire whether the circumstances of the present case are of the same sort or kind as any of those under which the exemption has been allowed.

Cases, in which goods distrained are in the actual possession of the owner, and which are protected for the sake of public peace, may be laid out of the question.

In the cases of yarn, carried to a beam to be weighed, and of a horse tied to a mill, during the grinding of the corn brought there: the goods and the horse

appear to have been spoken of as under the personal care of the owner, and may therefore be classed under the same head.

It may also be remarked, that the instance of the horse tied to the mill, is not a real, but a supposed case; and if the mill, supposed to be alluded to, be taken to be an ancient mill, at which the party was bound to grind his corn, the privilege may stand on its own peculiar ground.

The acknowledged head of exemption, which approaches nearest to the present case, is the second of those specified by Lord Chief Justice *Willes*, in the case of *Simpson v. Hartopp* (b), viz. things delivered to a person exercising a public trade, to be carried, wrought, or managed in the way of his trade or business. Such are the cases of goods delivered to tradesmen, artificers, carriers, factors, wharfingers, auctioneers, carcase-butchers, and the like.

Now, admitting that the business of the salt works, carried on by the tenant of the land, was a public trade, within the meaning of the second example mentioned by the Lord Chief Justice *Willes*, being open to the dealings of all persons indiscriminately, it is to be observed, in the first place, that the plaintiff's boat was not delivered to the person exercising that business. It was never placed under his charge or in his custody, but was left by the owner, for his own convenience, in the place where it was distrained; nor was it brought or left there for the purpose of being taken care of, managed, or in any way dealt with, or, so far as appears, of being loaded, by the tenant of the land. The case, therefore, is not analogous to the example.

It is true that the boat was brought for the purpose of trade, and it was intended by the owner that it should be loaded with salt manufactured at the salt works of the tenant, with a view to enable the plaintiff to employ such salt in his manufacture of alkali; and it is very possible that the exemption of the boat from distress might be beneficial to the trade both of the tenant and of the plaintiff who trades with him, and, for any thing that we know, such exemption might be conducive to the true interest of the landlord also. But we cannot, upon such grounds, take upon ourselves to say, in the absence of more direct authority, that the right of the landlord, or other person entitled to distrain for rent, is taken away.

Many other cases may be suggested, in which such an exemption may be thought conducive to the public good, and to the interest of trade. If a lodger leave his furniture in a public lodging-house, or if a farmer, having brought malt to a brewer, leave his cart in the yard, intending to bring back grains or beer when ready to be loaded; it might equally be contended that such things are exempt from distress. But we find no authority for holding that they are so. In the case of *Francis v. Wyatt* (c), the Court thought it much for the interest of the landlords themselves, that carriages standing at livery should not be subject to distress for rent; yet when called upon for a decision, they did not hesitate to pronounce in favour of the distress; there being, as the report says, no shadow of a legal claim for exemption. In the notes to *Saunders's Reports*, vol. 2, p. 289, b., Serjeant *Williams* says—"It seems that cattle belonging to a drover, being put into ground with the consent of the occupier, to graze only one night, in their way to a fair or market, would not, at this day, be held liable to the landlord's distress for rent;"

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v.
GREGORY.

(b) *Willes*, 512.

(c) 3 Burr. 1498.

Esch. Chamber. though the contrary had been ruled in *Fowkes v. Joyce* (d). And in *Rede v. Burley* (e), it was said by two of the Judges (*Beaumont* and *Owen*), though denied by *Walmsley*, that a horse which carrieth corn to a market, and is set up for a time in a private house, is not distrainable, because the purpose of bringing the horse was *pro bono publico*.

With respect to the first of these cases, the cattle may reasonably be considered as having continued in the possession of the drover; and, as to the second, that the horse was delivered into the care of the person at whose house he was set up. But supposing the cattle, in the one case, and the horse, in the other, to be privileged from distress, on the sole ground of affording encouragement and protection to persons frequenting fairs and markets, we have no authority to extend that privilege in derogation of a landlord's right, to mere customers resorting to the shop, warehouse, or manufactory of individuals. Being, therefore, unable to find any acknowledged class of exemptions, under which the present case can be ranged, or to which it can, by fair analogy, be compared, we think that the privilege contended for ought not to be allowed, and that the judgment of the Court of *Exchequer* ought to be affirmed.

Judgment affirmed.

(d) 3 Lev. 260; 2 Vent. 50.

(e) Cro. Eliz. 550, 596.

END OF EASTER TERM

CASES

ARGUED AND DETERMINED

IN THE

COURT OF EXCHEQUER.

IN

Trinity Term, 1 Victoria, 1838.

CROWTHER v. ELWELL.

Exchequer.

F. V. LEE moved for a rule to shew cause why the master should not review his taxation (a). The declaration contained four counts; the jury found a verdict for the plaintiff on two of the counts, and for the defendant on the other two. The master, on taxation, required the defendant to produce an affidavit, to the effect that his witnesses were material and necessary in support of the issues found for him; and that their evidence did not apply, in any degree, to the issues found for the plaintiff. The defendant failed to produce such an affidavit, and the master thereupon disallowed the costs of all the defendant's witnesses. The affidavit, in support of the motion, stated, that *A., B., C., D., E., and F.*, were, amongst others, subpoenaed as witnesses on behalf of the defendant: and that although the evidence of some of them referred, to a certain extent, to the issues found against the defendant, still that the witnesses, except *B., D., and E.*, were subpoenaed by the defendant *principally and specifically* with the view to support the issues found for the defendant; and that such witnesses, in the judgment and belief of the deponent, spoke only generally, and not materially, to the issues found against the defendant.

Where some issues have been found for the plaintiff, and others for the defendant, the latter is entitled to the costs of those only of his witnesses whose evidence has been confined to the issues that have been found for him.

F. V. Lee, in support of his motion, cited the cases of *Knight v. Woore* (b), and *Eades v. Everatt* (c).—[*Alderson, B.*—It is not sworn that the defendant's witnesses were not examined in chief as to the issues on which the

(a) The taxation was founded on Rule 74, of *Hilary Term, 2 Will. 4*, by which it is ordered, that "no costs shall be allowed, on taxation, to a plaintiff on any costs and issues on which he has not succeeded; and the

costs of all issues found for the defendant, shall be deducted from the plaintiff's costs."

(b) 5 Dowl. 487; 3 Bing. N. C. 3; 3 Hodg. 1; 4 Scott, 360.

(c) 3 Dowl. 687.

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plaintiff has succeeded. In *Lardner v. Dick* (*d*), a clear and definite rule was laid down. That case must govern the present (*e*).

Lee then applied for leave to amend his affidavit.

Leave granted to amend the affidavit

(*d* 2 Dowl. 333.

(*e*) It was there held, that where some issues were found for the plaintiff, and others for the defendant, that the defend-

ant was not entitled to the expences of his own witnesses, unless their evidence related exclusively to the issues found for him.

FREEMAN v. CRAFTS.

Where to an action of debt for goods sold, and work and labour, the defendant pleads generally, payment of a sum of money equal to the amount of the debts and monies mentioned in the declaration, the plaintiff need not newly assign.

Where the jury found generally that the defendant had paid the plaintiff a larger sum of money than was claimed in the declaration, but found a verdict for the plaintiff, the Court refused a rule to set aside this verdict, and to enter a verdict for the defendant.

DEBT. The declaration stated that the defendant was indebted to the plaintiff in the sum of 10*l.*, for goods sold, and in the like sum for work and labour, and on an account stated. *Second plea*, that "the defendant paid to the plaintiff divers sums of money, amounting in the whole to a large sum, to wit, the amount of all the several alleged debts and monies in the declaration mentioned, and of all damages sustained by the plaintiff, by reason of the detention thereof." Issue thereon. At the trial, before the undersheriff, it appeared that the action was brought to recover the sum of 9*l.* 12*s.* 6*d.*, the balance of an account between the plaintiff and the defendant. The jury found a verdict for the plaintiff, damages 9*l.* 12*s.* 6*d.*; and they also found that the defendant had paid the plaintiff the sum of 92*l.*

Corrie now moved for a rule to shew cause why the verdict should not be set aside, and a verdict entered for the defendant. The jury, in effect, have found a verdict for the defendant; for they have found that he has paid the plaintiff a larger sum of money than is claimed in the declaration.—[*Alderson*, B.—That sum has been paid on account of other demands than those for which the plaintiff brings his action.]—The plaintiff ought to have newly assigned. In *Collins v. Aaron* (*a*), where the defendant pleaded payment of a larger sum than the plaintiff sued for, the latter was allowed to amend his declaration, by increasing the damages.—[*Alderson*, B.—We will not have a new assignment to a plea of payment.—Lord *Abinger*, C. B.—Your plea means, that you have paid the sum mentioned in the declaration, or it means nothing. You ought to have shewn the payment of that identical sum.]—The meaning of the plea is, that the defendant has paid the sum of 30*l.* mentioned in the declaration, and the jury have found that issue in favour of the defendant, by finding the payment of a larger sum.

Per Curiam.—There is no ground for a rule in this case.

Rule refused.

(*a*) 4 Bing. N. C. 233; 1 Arnold, 54; 5 Scott, 595.

THOMAS and others, Assignees of BROWN and CHEETHAM, Bankrupts, v. CONNELLY, registered Officer of the Northern and Central Bank of England.

Ex regno.

ASSUMPSIT for money had and received to the use of the plaintiffs, as assignees, and on an account stated. *Plea, non assumpsit.* At the trial, before Coleridge, J., at the Liverpool Spring Assizes, 1838, it appeared that the plaintiffs were the assignees of *Brown and Cheetham*, bankrupts, and that the defendant was the public registered officer of the Northern and Central Bank of England. *Brown and Cheetham* became bankrupts in February, 1837, and the payments, alleged to be fraudulent, were made about three weeks afterwards. At the trial, the plaintiffs, before proving the insolvency or bankruptcy of *Brown and Cheetham*, or any payments by them to the defendant, asked a witness, what was said to him by *Cheetham* in November, 1836, respecting the settlement of a debt of one *Maguire*? The defendant's counsel objected to the reception of this conversation, on the ground that it took place before the bankruptcy, and before the payment to the defendant, and was not connected with either. The learned judge admitted the evidence, and the plaintiffs having proved the bankruptcy, and the payments to the defendant, obtained a verdict.

On a question of fraudulent preference, the declarations of the bankrupt, although made before the payment in question, or the act of bankruptcy, are admissible in evidence, as proving his intention in making that payment.

Semle, they ought not to be admitted, until some foundation has been laid for their reception, by the proof either of the insolvency or the payment.

Sir F. Pollock having obtained a rule, calling upon the plaintiffs to shew cause why the verdict should not be set aside, and a new trial granted,

Cresswell, R. Alexander, and Wightman, shewed cause.—The plaintiffs proved, at the trial, the insolvency of the bankrupts, and the payments made by them to the defendant; and they were at liberty to give in evidence the declarations of the bankrupt *Cheetham*, with a view to shew his intention of fraudulently preferring the defendant. On a question of fraudulent preference, the point to be considered is, what operates on the mind of the debtor. His intention in making the payments is evidenced by his declarations, and those declarations are receivable, although made prior to the payments in question.

W. H. Watson and J. Henderson, contra.—The declarations of the bankrupt were inadmissible, as they were not connected with the payments, or made with reference to the accounts. In *Vacher v. Cocks (a)*, the declarations proposed to be proved were made about the time of the insolvency of the bankrupt. Here the payments did not take place until three weeks afterwards. This was not a statement accompanying any act. The case of *Lees v. Marton (b)*, shews that the declarations of a bankrupt, made shortly after an absence from his house, are not admissible to prove such absence to be an act of bankruptcy.—[Lord Abinger, C. B.—If declarations are used to prove an act of bankruptcy, it is clear that they must be connected with some act done.]—*Abbott v. Pomfret (c)*, *Peacock v. Harris (d)*, are in point.

(a) 1 Moo. & Malk. 353.

(b) 1 Moo. & Rob. 210.

(c) 1 Bing. N. C. 462; 1 Hodges, 24; 1 Scott, 470.

(d) 5 Ad. & Ell. 449; 2 Har. & Woil. 281; 1 Nev. & Per. 240.

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LORD ABINGER, C. B.—The object in giving the bankrupt's declarations in evidence was, to shew that he was aware of his insolvency; and when the fact of insolvency is proved, the declaration of the bankrupt may furnish evidence of fraudulent preference. In this point of view the evidence was admissible; and therefore the rule for a new trial must be discharged.

PARKE, B.—I doubt if this evidence was admissible at the particular stage of the cause at which it was offered. Declarations are not received to explain the absence of a party, except where they are made at the time of his departure, his absence, or his return. If the fact of insolvency is proved *aliunde*, then the declarations of a party are admissible to show his knowledge of that fact. That was the case in *Vacher v. Cocks*; Mr. Serjt. Wilde there contended for the admissibility of the declarations of the bankrupt, not as proving an act of bankruptcy, but as shewing under what circumstances, and with what opinion the payment was made. In the same manner the evidence now in question was admissible, to shew that the bankrupt was aware of his insolvency. In a case similar to the present, that was tried before me, I postponed the proof of declarations until the fact of the insolvency was established. In the present case, if the bankrupt was insolvent, it is clear from his declarations that he was aware of it.

BOLLAND, B.—It may be a question, whether the learned judge was right in receiving the evidence at the particular stage of the cause, or whether he ought not to have postponed it until certain facts had been established. But as those facts were afterwards supplied, I think there is no ground for disturbing the verdict.

GURNEY, B.—The declarations of the bankrupt, when coupled with the fact of his insolvency, were sufficient to prove his knowledge of that fact.

Rule discharged.

EDMONDS v. CATES.

It is unnecessary, under the 12th rule of *Trinity Term*, 1 W. 4, to give a twenty-four's notice of taxing costs.

KNOWLES moved for a rule to shew cause why the taxation of the plaintiff's costs should not be set aside, on the ground that one day's notice had not been given within the meaning of the 12th rule, *Trinity Term*, 1 W. 4, which requires that "before taxation of costs, one day's notice shall be given to the opposite party." The notice had been given at eight o'clock in the evening of one day, and the taxation took place at twelve o'clock on the following day.

PARKE, B.—It is sufficient if notice be given on one day, for taxation on the next day. The rule does not say that twenty-four hours' notice shall be given.

Rule refused.

DOE, d. COUZENS v. ROE.

Eschequer.

CORRIE moved for judgment against the casual ejector. There were two demises in the declaration, but the affidavit of service was entitled, 'Doe, on the demise of *Couzens v. Roe*.' He cited *Doe, d. Jenks v. Roe* (a), as an authority, that it was unnecessary, in an affidavit of service, to state the character in which the lessors of the plaintiff sued.

Where in a declaration in ejectment, there are two demises, an affidavit, which is entitled on the demise of one only of the lessors, is insufficient.

Per Curiam.—The affidavit ought to have been entitled "on the several demises." A difficulty might arise, if it should become necessary to assign perjury.

Rule refused (b).

(a) 2 Dowl 55.

(b) See *Doe, d. Barles v. Roe*, 5 Dowl. 447.

PRICE v. HAMER.

A RULE had been obtained, calling upon the plaintiff's attorney to shew cause why he should not pay a certain sum to the defendant; and why he should not answer the matters in the defendant's affidavit.

Affidavits may be used by both parties, as soon as they are filed.

R. V. Richards shewed cause, and contended that the affidavits filed by him, in opposition to the rule, could not be read by the other party, unless it appeared that they were intended to be used by the party filing them, and that the non-user of them by the party filing them, was the best proof of his not intending to use them. He understood that the point had been so ruled by the Court of *Queen's Bench*.

Per Curiam.—We have sent to the Court of *Queen's Bench*, and have ascertained, that, by the practice of that Court, and of the *Bail Court*, affidavits may be used by both parties, as soon as they are filed.

COOK v. VAUGHAN.

MANSEL moved for a rule to shew cause why the writ of *capias*, in this case, should not be set aside, and the bail-bond delivered up to be cancelled, on a common appearance being entered. The ground of the motion was, that in the writ of *capias*, the defendant was described as "gentleman," whereas that word was omitted in the copy of the writ. He contended, that the word "gentleman," had been made a material part of the writ; and he cited *Smith v. Pennell* (a).

Where a defendant was described in a writ of *capias*, as a "gentleman," but the word "gentleman" was omitted in the copy of the *capias*, the Court set aside the writ for irregularity.

(a) 2 Dowl. P. C. 654.

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Wordsworth shewed cause, in the first instance.—The only question is, whether the omission of the word “gentleman” affects the sense of the copy of the writ, or tends to mislead the defendant, *Pocock v. Mason* (b); *Sutton v. Burgess* (c); *Forbes v. Mason* (d). Alluding to the case of *Hodgkinson v. Hodgkinson* (e), Mr. *Tidd* says, “But this decision was afterwards disapproved of by the Court in *Colston v. Berends*, 1 Cr., M. & R. 833, and from other cases (f), it seems that the Court will not set aside the copy of a writ of *capias*, served on the defendant, on account of any trifling variance, which does not affect the sense, or is not calculated to mislead the defendant (g).”—*Tidd. Prac.* edit. 1837, p. 91. The word “gentleman” may be rejected as surplusage, since the Uniformity of Process Act, 2 W. 4, c. 39, does not require any description of the defendant, *Morris v. Smith*. In *Smith v. Pennell*, the omission of the word “London,” was material. Here, the copy delivered to the defendant is substantially a copy of the writ.—[*Al-derson*, B.—How can we say that the defendant has received a copy of the writ, when the word “gentleman” has been omitted.]

Per Curiam.—We must adhere to the usual rule, and require the plaintiff to deliver a correct copy of the writ. It is true that the Act of Parliament does not require the defendant’s addition to be inserted in the writ; but it does require the plaintiff to deliver a copy of all that is contained in the writ. This rule, therefore, must be made absolute, without costs, on the defendant’s entering a common appearance, and undertaking not to bring any action.

Rule absolute accordingly.

(b) 1 Bing. N. C. 245; 5 M. & Scott, 51.

(c) *Sutton v. Burgess*, 1 Cr., M. & R. 770; 1 Gale, 17.

(d) 3 Dowl. 104.

(e) 1 Adol. & Ell. 533; 3 Nev. & Man. 564; 2 Dowl. 635.

(f) *Cooper v. Wheale*, 4 Dowl. 281; 1 Har. & Woll. 525.

(g) 2 Cr., M. & R. 120; 1 Gale, 103.

HAYWARD v. GROVE and GIFFARD.

A tenant, whose goods had been distrained, brought an action of trespass, the expence of which was paid by his landlord, who was the party really interested in the event of the action. Judgment, as in case of a nonsuit having passed against the tenant, who was in indigent

TRESPASS for taking the plaintiff’s goods under a distress for rates. The plaintiff was under-tenant of one *George Spencer*, who was the lessee of a renewable lease, held under the Dean and Chapter of *Westminster*. The defendant *Giffard* was clerk to the trustees of *Tothill-fields*, and acted under the authority of an Act of Parliament for paving and lighting, and improving that district, and for raising a rate for those purposes. The defendant *Grove* was the broker, employed in the distress upon the plaintiff’s premises. It was admitted in the cause, that the action was brought at the expence of *Spencer*, and that *Hayward* was the nominal plaintiff only. Judgment as in case of a nonsuit, having passed against the plaintiff, who appeared, from the affidavits, to be in indigent circumstances, and unable to pay the costs, *J. Jervis* obtained a rule, calling upon *Spencer* to shew cause, why the costs of the nonsuit, together with the costs of this application, should not be paid by him.

charged a rule, calling upon landlord to pay the costs.

Rogers shewed cause.—This is an unprecedented application. The admission of *Spencer* that he was the real plaintiff, should have induced the defendants to come, at an early stage of the cause, and demand security for costs. The Court would then have stayed proceedings until such security had been given, *Tenant v. Brown* (a); *Adams v. Brown* (b). No authority can be cited in favour of the present application.

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J. Jervis, contra.—*Spencer* is the real plaintiff in this suit; and there is no case which shews that a person is not bound to pay costs, when he has admitted himself to be the party really interested in the action. In *Berkeley v. Dimery* (c), where the Court refused to make the real defendant pay the costs, the defendant on the record had actually committed the trespass.—[*Parke, B.*—There the real party might have been made a defendant on the record, and was seeking advantage by putting forward a nominal defendant. In this case *Spencer* could not have brought an action of trespass, for the warrant was directed against the goods of *Hayward*. The defendants should have applied for security of costs, and the Court would then have stayed proceedings until such security had been given. The case of *Tenant v. Brown*, would have been an authority in favour of that application. I recollect a case in the *King's Bench*, some time ago, where the Court was moved to make a real defendant pay the costs of an action to try a right of way, in which a nominal defendant had been placed upon the record. The motion, however, was dropped (d)].—In *Blewitt v. Tregonning* (e), the Court refused to order the costs of the action to be paid by a third party, who was alleged to be the real defendant. But that decision proceeded on the ground that the affidavits were not sufficiently strong, as they merely stated a *belief* that the third person had defended the action. The Court expressed no doubt of their authority to make a party pay costs under such circumstances.

Lord ABINGER, C. B.—Courts of law would work great injustice, if they adopted the suggestions of equity and natural justice. The authority of the Courts of this country is derived from the King's writ. The *Exchequer* was originally intended for none but debtors to the Crown; what right, then, can we have to make a general order upon a party who does not appear before us as a plaintiff or defendant. If a person, against whom an order is applied for, has been guilty of a contempt, this Court would have power to deal with such a case, because every Court must possess, as incidental to its jurisdiction, the power of committing for contempt. But how can we be said to possess a right of making an order against the party in question, merely because he has an interest in the action? If we were to make this rule absolute, we should open a wide door to injustice. There are cases, it is true, where parties are compelled to give security for costs; as, for instance, where actions are brought at the instigation of those who are not parties to the record; but then that object is effected by staying proceedings, until such security is given. In ejectment, the Court is accustomed to order the real party to pay the costs;

(a) 5 B. & Cr. 208.

(b) 9 Bing. 81; 2 M. & Scott, 154.

(c) 10 B. & Cr. 113.

(d) This case seems to be alluded to by *Patteson, J.*, in his judgment, in

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Lloyd v. Evans, 1 Will., Woll. & Dav. 51, *Hil. T.* 1837.

(e) 5 Dowl. 404; 2 Har. & Woll 325.

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but that form of action is a fiction of law. The suit is brought in the name of a nominal party; it is clear he could not pay costs. The landlord is also allowed to appear and defend; but the Court, which confers this privilege, will not allow him to shelter himself under the tenant's name, when, in fact, he is the real party. This, however, is an excepted case. The Court cannot make the required order, and the rule must therefore be discharged

PARKE, BOLLAND, and GURNEY, Barons, concurred.

Rule discharged (f).

(f) See *Lloyd v. Evans*, 1 Will., Well. & Dav. 51.

SINCLAIR and others, Assignees of GEE, a Bankrupt, v.
 BAGGALEY.

A written acknowledgment by a bankrupt, tending to charge him, and bearing date before his bankruptcy, is, as against his assignees, *prima facie* evidence of its having been made on the day on which it bears date.

DEBT, by the assignees of *Gee*, a bankrupt, for goods sold, and on an account stated. *Plea*, that *Gee*, before and at the time of his bankruptcy, and from thence hitherto had been, and was, indebted to the defendant in a large amount, for goods sold, money paid, and on an account stated. *Replication*, that *Gee* was not indebted, &c. The plaintiff claimed by his particulars the sum of 59*l.* 18*s.* 9*d.* At the trial, which took place before *Little-dale*, J., at the *Nottinghamshire* Spring Assizes, 1838, the defendant proved a payment of 74*l.* 11*s.* 6*d.* on account of the bankrupt. He also put in an account of certain goods, delivered by him to the bankrupt, by which it appeared that a balance had been struck between the parties, and a sum of money paid to the bankrupt by the defendant. The account bore date before the bankruptcy, and was signed by the bankrupt. It was tendered in evidence, on the part of the defendant, and objected to by the plaintiffs, on the ground that it was not admissible, unless it were shewn, by extrinsic evidence, that it had been signed by the bankrupt on the day on which it bore date. The learned judge received the evidence, being of opinion that the account itself furnished *prima facie* proof of its having been signed on the day of its date. The jury found a verdict for the defendant. *Humfrey* having obtained a rule to shew cause, why this verdict should not be set aside, and a new trial granted, on the ground that the account was improperly received in evidence.

Whitehurst and *Miller* now shewed cause.—Whether an instrument must be presumed to have been made on the day on which it bears date, depends upon the question, whether it is used in favour of, or against the party making it. In *Goodtitle v. Milburn* (a), which was an action of ejectment against the assignee of the mortgagor, it was held, that a letter from the mortgagor to the mortgagee, dated previously to the assignment, would be presumed to have been written at the time of its date, unless the contrary were shewn. The counsel for the defendant there cited *Wright v. Lawson* (b), where an

(a) 2 Mee. & W. 853; 1 Mur. & Hurl. 207.

(b) 2 Mee. & W. 739; 1 Mur. & Hurl. 202.

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I O U, bearing date before the bankruptcy of a trader, was held to constitute no evidence of a petitioning creditor's debt, without some proof of its being in existence before the bankruptcy. They also contended, that the two cases were nearly identical. This was denied by Lord Abinger, who said, "the distinction is, that here the letter is produced in evidence *against* the insolvent, which is the converse of that case. In the case of assignees, who are seeking to set up a right, and have to prove the petitioning creditor's debt, they are bound to shew, that the bill of exchange, the subject of the petitioning creditor's debt, was in existence before the bankruptcy." Here, the account being signed by the bankrupt, is, as against his assignees, *primâ facie* evidence of its having been signed on the day of its date. It is true, that in *Dickson v. Evans* (c), it was held, that to an action brought by the assignees of a bankrupt, for a debt due to the bankrupt's estate, that the defendant could not set off cash notes issued by the bankrupt, payable to bearer, and bearing date before his bankruptcy, unless he shewed that such notes came to his hands before the bankruptcy. But that decision was founded on the peculiar circumstances of the case; and *Lawrence, J.*, observed, that "if the notes had been made payable to the defendant himself, he should have thought it reasonable evidence of their having come to his hands at the time they bore date." All the cases, where documents signed by the bankrupt, have been held to require proof of a date *aliunde*, have been cases where the assignees have attempted to take advantage of those documents. This was the case in *Hoare v. Coryton* (d); *Smallcombe v. Bruges* (e). However, in *Taylor v. Kinloch* (f), which was the case of a promissory note, a different rule was established.—[Lord Abinger, C. B.—A transaction between a petitioning creditor and a bankrupt, differs from the case of a bill which has got abroad, and has passed into the hands of third parties.]—*Hunt v. Massey* (g), and *Smith v. Battens* (h), support the defendant's argument.—[*Alderson, B.*—The difficulty is, that at one period the bankrupt had power to make the admission, and that at another he had not. Ought you not to prove that he had the power of making it at the time when it bears date?—The document itself is admissible for this purpose, as *primâ facie* evidence. What the plaintiffs ask the Court to presume is, that the bankrupt has been guilty of a fraudulent attempt to defeat the claims of his assignees, by signing the account after his bankruptcy. *Williams v. The East India Company* (i), shows that the Court will not make such a presumption. The defendant, moreover, was entitled to a verdict on the rest of his evidence.

Balguy and Humfrey, contra.—It is clear, that declarations made after the bankruptcy, cannot be received against the assignees; and therefore it was the duty of those who tendered the account in evidence to shew at what time it was signed. It was incumbent on them to prove, that the party who made the admission, was capable of making it. Suppose the evidence had not been documentary, and a witness had been asked, if he had not heard the bankrupt to acknowledge that he had been paid. Such evidence would not be satisfactory, unless the time of the acknowledgment were also shewn. The circum-

(c) 6 Term Rep. 57.

(d) 4 Taunt. 560; 2 Rose, 158.

(e) M'Cle. 45; 13 Price, 136.

(f) 1 Stark. N. P. C. 175.

(g) 5 B. & Adol. 902.

(h) 1 Moo. & Rob. 341.

(i) 3 East, 192.

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stance of there being other evidence in favour of the defendant, does not affect the present question; since the improper admission of evidence may be a ground for a new trial, although the evidence, if received, might have had but little effect upon the minds of the jury, *Wright v. Doe, d. Tatham (j)*.

LORD ABINGER, C. B.—Those cases, where notes and other documents made by bankrupts have not been received in evidence without extrinsic proof of their date, stand on peculiar grounds. It is the interest of the petitioning creditor to support the commission, and the law being jealous of any interference on the part of the bankrupt, requires proof of the actual date of the instrument. And this doctrine applies particularly to the cases of bills which have not passed through other hands than those of the petitioning creditor. But where the instrument is offered in evidence *against* the bankrupt or his assignees, the date on the face of it is *prima facie* evidence that it was made at that time, and dispenses with the necessity of proving the actual date. In such a case, where bills of exchange bear date before the bankruptcy, they must be presumed to be regular, unless the contrary appear. In the present case, there is no evidence of the time of the commission, or of the act of bankruptcy. The party who objected to this document might to have impeached it, by shewing that the act of bankruptcy took place after its date. This view is supported by the whole current of authorities; and therefore I think that the learned judge was right in admitting the evidence, and that a new trial ought not to be granted.

BOLLAND, B.—I am of the same opinion. Whether proof of the actual date is necessary in a case like this, depends upon the question, which party tenders the evidence. In the present case, the evidence is tendered by the defendant, and there is no suspicion of collusion. I think, therefore, that this rule must be discharged.

ALDERSON, B.—I think we must conclude that this receipt was given at the time of its date. If it were given after the bankruptcy, it would be fraudulent, and fraud is not to be presumed.

GURNEY, B., concurred.

Rule discharged.

(j) 1 Will., Woll. & Dav. 566; 2 Nev. & Per. 305.

MAY v. PYKE.

An attorney, who has received a declaration for a defendant, for whom an appearance has been entered, cannot be changed without a rule of Court.

THE defendant not having appeared, the plaintiff entered an appearance for him, and delivered a declaration to one *Dickenson*, who accepted it as his attorney. The time for pleading expired on the 26th May. On the 25th, the defendant served upon the plaintiff a summons to plead several matters; this summons the plaintiff refused to attend. On the 26th, the defendant took out a summons for further particulars, returnable on the 28th. Neither summons was indorsed with the name of *Dickenson*, but with

that of another attorney; there had been no rule to change the attorney. On the 28th, the plaintiff signed judgment. A rule *nisi* having been obtained, calling upon him to shew cause why this judgment should not be set aside,

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Blair shewed cause, and contended, that as there had been no rule to change the attorney, the plaintiff was at liberty to treat the first summons as a nullity.

Pyke, contra, insisted that an order to change the attorney was unnecessary, where the party had not appeared by attorney, or where the name of the attorney had not appeared on record. He cited *Wells v. Secret* (a).

Per Curiam.—An order to change the attorney was necessary, as the defendant had accepted the declaration. The plaintiff had a right to treat the first summons as a nullity. The rule for setting aside the judgment will be made

Absolute, on payment of costs by the defendant.

(a) 2 Dowl. 447.

HUGHES v. REES.

LIBEL. The declaration contained four counts; the two first set out libels that had appeared in former numbers of a newspaper; the third count was as follows: "The defendant afterwards, and further contriving and intending, &c., and to cause it to be suspected and believed that the plaintiff was guilty of fraud and improper conduct, in a subsequent number of the said newspaper, published, &c., the false, libellous, &c., matter following, of and concerning the plaintiff, that is to say, 'we again assert the cases formerly put by us on record, we assert them against *A. S.* and *Achilles Hughes* (by the latter, meaning the plaintiff,) that they are such as no gentleman or honest man would resort to.'" The declaration did not contain any introductory account of the "cases." The jury found a verdict for the plaintiff, with general damages. A rule *nisi* having been obtained to arrest the judgment, on the ground that the words in the third count, taken in their ordinary sense, and without any introductory statement to explain their meaning, were not libellous:

Libel. The declaration contained four counts, the two first of which set out libels contained in the former numbers of a newspaper. The third count was to this effect, "And the defendant afterwards further contriving &c., and to cause it to be believed that the plaintiff was guilty of fraud, &c. in a subsequent number of the newspaper published the false, libellous, &c., matter following, of and concerning the plaintiff, that is to say, 'we again assert the cases formerly put by us on record; we assert them against *A. S.* and *Achilles*

Maule, Talfourd, and R. V. Richards, shewed cause.—A declaration and a count are one and the same thing, and are so considered in the *Doctrina Placitandi*. A count, taken in the limited sense of the word, may contain a complaint of many things, and so may a declaration. In this case the declaration contains but one complaint; and that part of it which is termed the third count, is nothing more than a separate allegation.—[Lord *Abinger*, C. B.—Each count presents a new story.]—An allegation does not form a separate

Held, First, that the third count was to be considered as a separate and distinct count. *Secondly*, that after verdict, the words in question must be considered libellous.

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count, unless it be so stated: nor do the words, "further contriving and intending," make it a different count. Here is a statement, that certain charges had been made against the plaintiff in many newspapers; supposing they had all been made in one newspaper, and the declaration had set them out, could it be said that, because you might reject the non-libellous matter, the declaration could not be sustained.—[Lord ABINGER, C. B.—When you declare, you may put all the libellous words in one count, or you may make separate counts, but you cannot insert in the same count words spoken at different times.]—Secondly, judgment may be arrested, where the Court must intend that the jury have given damages for a cause which is not actionable. The question then is, whether the jury have found damages for words that afford no ground for action?—[Lord Abinger, C. B.—The jury having found a general verdict, which is a verdict on each count, must be presumed to have given damages on each count.]—The third count contains a libellous allegation. The word "against" must be taken as conveying a charge; the old rule of construing words in their mildest sense, having been long abandoned, *Woolnouth v. Meadows* (a).—[Alderson, B.—Suppose a friend of the plaintiff had been accused, the meaning of the words might then be, that the defendant maintained the criminality of that friend in opposition to the opinion of the plaintiff.—Lord Abinger, C. B.—Whether the word "against" has an accusatory sense, would depend on the context; there would have been no difficulty, if the "cases," said to have been "put on record," had been introduced into the declaration.]—After verdict, the words must bear the meaning ascribed to them by the plaintiff, *Tomlinson v. Brittlebank* (b), *Harvey v. French* (c), *Adams v. Meredew* (d).

Whateley and Busby, contrd.—It is clear that the third count is a separate one, because the plaintiff might have taken a verdict on the three other counts. Besides, the libel in that count refers to a different time of publication. The declaration states it to have been published "afterwards," and in a "subsequent number of the said newspaper." In *Chitty's Pleadings*, it is said to be usual to state distinct complaints in separate counts. The words, "assert against," have not necessarily any libellous signification; they are ambiguous, and therefore there ought to be some special introduction to the third count, or something to shew that they applied to the plaintiff, *Hawkes v. Hawkey* (e). The case of *Tomlinson v. Brittlebank* does not apply; and in *Harvey v. French*, the words were held to be libellous, without any innuendo. Here the words were equivocal; and it was therefore incumbent on the plaintiff to shew that they had a libellous meaning, *Kelly v. Partington* (f):

Cur. adv. vult.

The judgment of the Court was afterwards delivered by

Lord ABINGER, C. B.—The declaration in this case contained four counts, and as one of them was alleged to be bad, and entire damages had been given,

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| (a) 5 East, 463. | (d) 3 Yo. & Jer. 219. |
| (b) 4 B. & Adolph. 630. | (e) 8 East, 427. |
| (c) 1 Cr. & Mee. 11; 2 Tyr. 585; | (f) 5 B. & Adol. 645. |
| 2 M. & Scott, 591. | |

a motion was made in arrest of judgment. The words in the count, stated to be defective, were these: "We again assert the cases formerly put by us on record; we assert them against *A. S.* and *Achilles Hughes*; that they are such as no gentleman, or honest man, would resort to." The first answer given to the objection of the defendant was, that all the counts in the declaration, properly speaking, constituted only one count. We think however, that the counts are quite separate and distinct. But the most important point is, that this objection is made after verdict. Now, the words in the declaration are to be taken in their most natural and obvious sense; the question then is, what is the meaning of the word "against." Is it a mere denial of the correctness of the plaintiff's assertion, or does it amount to a charge against him. If the former construction is to prevail, the words are not libellous; but if it is taken in the latter sense, then it amounts to a libel. The jury have thought that it conveys an accusation against the plaintiff; and as we think they have put the most natural construction upon the word, the rule must be discharged.

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Rule discharged.

GOODE and another v. HOWELLS.

DEBT to recover the sum of 11*l.* 15*s.* due under a composition for tithes, from *Michaelmas*, 1835, to *Michaelmas*, 1836: *Plea*, that the defendant was not indebted.

At the trial, before *Coltman, J.*, at the *Cardiganshire* Spring Assizes, 1838, it appeared that the plaintiffs were the lessees of the tithes of *Plasyparke* farm, in the parish of *Llanfihangel Abercowin*, and that the defendant was a farmer, occupying *Plasyparke*. On the 19th *September*, 1835, the defendant served the following notice upon the plaintiffs:

"Take notice, that I shall, on and from the twenty-fifth day of *March* next, give out and pay in kind, all the great and small tithes arising from a certain farm, called *Plasyparke*, in the said parish of *Llanfihangel Abercowin*, which I now occupy.

Dated this 19th day of *September*, 1835.

(signed) *William Howells.*"

The composition related to tithes due for corn, wool, lamb, and cheese. The defendant contended that the holding began in *March*, the plaintiff maintained that it began at *Michaelmas*. The jury gave a verdict for the defendant, finding, at the same time, that the holding began in *March*. A rule having been obtained, calling on the defendant to shew cause why the verdict should not be set aside, and a new trial granted, on the grounds, *first*, that the defendant's notice was insufficient to determine the tenancy; *secondly*, that the verdict was perverse.

Evans and *Nicholl* shewed cause.—The notice is good. The inclination of the Courts has always been to give effect to notices to quit. This is evident; *secondly*, that the notice in this case was insufficient, as it did not specify the time of determining the composition.

Debt to recover a certain sum, due under a tithe composition, from *Michaelmas*, 1835, to *Michaelmas*, 1836. The defendant relied upon a notice to quit, given by him to the plaintiffs, and which was in the following terms; "Take notice, that I shall, on and from the 25th day of *March* next, give out and pay in kind all the great and small tithes arising from a certain farm, called *P.*, in the said parish of *L. A.*, which I now occupy. Dated this 19th day of *September* 1835." (signed) *W. H. Held*, *first*, that the same notice to quit was requisite in a yearly tithe composition as if a tenancy, from year to

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dent from the language of *Bayley, J.*, in *Doe, d. Rodd v. Archer (a)*, where, he says, "we are to construe the notice to quit in such a way *ut res magis valeat quam pereat*." The same principle is recognized in *Doe, d. Duke of Bedford v. Kightley (b)*; *Doe, d. Lord Huntingtower v. Culliford (c)*; *Doe, d. Phillips v. Butler (d)*. It is not necessary for a party to point out the precise period when he means to leave the premises; it is enough if he signifies his intention of quitting them at the legal expiration of his term. In *Doe, d. Williams v. Smith (e)*, the Court rejected the word "present," which appeared in the notice; and *Patteson, J.*, observed that it was unnecessary to word a notice with the accuracy of a plea. This notice is sufficient to determine a composition for any year subsequent to 1835.—[*Parke, B.*—This notice does not specify any time of quitting. Take the case of land; would a general notice to quit, not stating any time, operate as a notice to quit at *Michaelmas*. A composition for tithes, and a tenancy for years, are the same thing.]—The notice in this case is sufficient, as the landlord knows at what time the tenancy expires. In *Hewitt v. Adams (f)*, the only point decided was, whether the particular notice was good. No decision was given on the question, whether a notice, which is bad for one year, may not be good for succeeding years. In *Wyburd v. Tuck (g)*, *Eyre, C. J.*, disputes the analogy between tithes and land.—[*Lord Abinger, C. B.*—The reasons of his opinion imply that, to determine a tithe composition, a longer notice is necessary than in the case of a holding of land.—*Bolland, B.*—The case of *Hulme v. Pardoe (i)*, decides, that a notice to determine a tithe composition must be similar to a notice to determine a yearly tenancy.]—In *Leech v. Bailey (j)*, the plaintiff, in *July*, 1814, the usual time of taking the tithe, gave notice, that, for the time to come, he should require the tithes to be paid to him in kind. There the notice, which is as general as the present, was held good.—[*Lord Abinger, C. B.*—In that case the tithes were due in *July*, and the notice was a twelve months' notice.]—Here a full year must elapse before the tithe accrues.—[*Parke, B.*—In your case the notice is to determine *all* tithes.]—The notice would operate upon all future tithes.

Chilton and E. V. Williams, contra, were stopped by the Court.

LORD ABINGER, C. B.—My brother *Coltman* informs us, that he is not satisfied with the verdict of the jury; and the question is, whether the new trial shall be granted on the point of law, or on the ground of the verdict being against evidence. I think the notice to determine a tithe composition should be analogous to a notice to quit land. That has been settled law since the case that was decided in the House of Lords, and I should be sorry to disturb it. The notice in this case would have been good, if it had indicated some period at which the composition was to expire, and that period had been one at which, according to law, the composition might have terminated. In this case, some tithes were due in *May*. As, therefore, no time is specified at which the composition is to terminate, we must hold the notice to be insufficient.

(a) 14 East, 248.

(b) 7 Term Rep. 63.

(c) 4 Dowl. & R. 249.

(d) 2 Esp. N. P. C. 589.

(e) 5 Ad. & Ell. 350; 2 Har. & Woll.
 176.

(f) 7 Bro. Parl. Cas. 74; cited also
 in *Fell v. Wilson*, 12 East, 84.

(g) 1 Bos. & Pul. 463.

(h) M'Clel. 393; 1 Car. & P. 93;
 13 Price, 684.

(i) 6 Price, 504.

PARKE, B.—I think the rule for a new trial must be made absolute. It is clear, from the report of the learned judge, that the verdict was against the weight of evidence. Since the cases of *Hewitt v. Adams*, and *Wyburd v. Tuck*, a tithe composition from year to year must be determined by a notice similar to that which is given in the case of land; that is, it must terminate with the year of composition. The question, therefore, is, whether this notice is good. The case of *Leech v. Bailey* (*k*), does not apply here, because, as was there stated by the Chief Baron, the notice was for more than half a year, as the tithes would not be again payable for much more than six months after the notice. But in the present case, the notice, though future as to part of the tithe, is intended with regard to other parts to have an immediate operation. I think, therefore, that this notice is bad.

BOLLAND, B.—I am of the same opinion. The case of *Bishop v. Chichester* (*l*), establishes the analogy between a notice to quit, in a yearly tenancy, and a notice to determine a tithe composition.

Rule absolute, without costs. !

(*k*) 6 Price, 504.

(*l*) 2 Brow. Parl. Cas. 161; 4 Gwillim, 1322.

WICKENS v. COX.

IN this case the defendant, on the 26th *February*, had served on the plaintiff an order for further particulars; no particulars were delivered. On the 18th *May* the defendant served the plaintiff with a paper, containing a demand of declaration, with a notice of the abandonment of the order written in the lower corner of it, and no declaration having been delivered, signed judgment of *non pros*. A rule having been obtained, calling upon him to shew cause why this judgment should not be set aside,

Cowling shewed cause.—A party, who has obtained an order for his own benefit, may abandon it if he thinks proper, *Joddrel v.* — (*a*).—[*Parke, B.*—In the present case, the order has been served, and proceedings have been stayed. Can you get rid of it, except by an instrument equally formal?]—The observations of the Court in *M'Dougall v. Nicholls* (*b*), are also in point.—[*Alderson, B.*—As proceedings have been stayed under this order, is the defendant's notice, that he does not require any particulars, equivalent to a delivery of them?]*—The defendant contends that it is.*

F. V. Lee, contra.—If an order has been made and served, it can be abandoned only by taking out a fresh summons for that purpose. But here that question does not arise. The demand of declaration was made on the same

The defendant having served the plaintiff with an order for particulars, which were not delivered, afterwards served a demand of declaration upon him, with a notice of abandoning the order, written in the lower corner of it, and then signed judgment of *non pros*. The Court set aside this judgment as irregular, on the ground that the demand of declaration was made before notice of abandoning the order.

Quære, whether an order once served, can be abandoned, except by means of an instrument equally formal.

(*a*) 4 Taunt. 253.

(*b*) 3 Ad. & Ell. 813; 1 Har. & Woll. 462.

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paper that contained the abandonment of the order, and being made before the abandonment, was clearly irregular. He was stopped by the Court.

Per Curiam.—The master informs us that the proceedings of the defendant have been irregular. The demand of declaration is made before any notice of the abandonment of the order; whereas the notice of abandoning the order should precede the demand of a declaration.

Rule absolute (c).

(c) See Chitty's Archbold's Practice, 3d edit., p. 896; and Tidd's New Prac. p. 258.

REGINA v. SHERIFF OF CHESHIRE, in GOACH v. ATKINSON.

In an application by the sheriff or bail to stay proceedings, the affidavit must state that it is made "for his or their indemnity only;" the words "for his only indemnity," are insufficient."

CROMPTON shewed cause against a rule *nisi* for setting aside an attachment against the sheriff, on payment of costs. He objected that the affidavit, upon which the rule had been obtained, did not comply with the rule of this Court of *H. T.*, 7 *W.* 4, which required such affidavit to state that the application was really and truly made on the part of the sheriff or bail, "at his or their own expences, and for his or their indemnity only." In the present case the form of affidavit was, for his *only indemnity*.

Butt, in support of the rule, contended that the meaning was substantially the same. The rule of the *King's Bench*, *M. T.*, 59 *Geo.* 3, as reported in 2 *B. & Ald.* 240, was in precisely the same terms; and that form was followed by all the books of practice (a).

PARKE, B.—The affidavit should follow the terms of the rule, and is therefore irregular; but under the circumstances, I think an amendment ought to be allowed. His lordship then stated, that the rule of this Court was intended to be an exact transcript of that of the *King's Bench*, and suggested that a new rule should be drawn up; on referring, however, to the original rule in the *King's Bench*, it appeared that the words there used were, "for his or their indemnity only;" and that the rule had been inaccurately copied in the 2 *B. & Ald.* 240, and from thence to the books of practice.

Amendment allowed.

(a) Tidd, 316; Archbold, 3d edition, 147; Archbold, Prac. of Country Attornies, 172.

AIREY v. FEARNSIDES.

Where there is a good and a bad count, and a general verdict is found for the plaintiff, the Court will not arrest the judgment, but will grant a *venire de novo*.

ASSUMPSIT. The first count stated that the defendant made his promissory note in writing, and thereby promised to pay to the plaintiff or order 13*l.*, for value received, with interest, "and all fines, according to rule." "and all fines, according to rule."

There was also a count on an account stated. A verdict having been found for the plaintiff,

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W. H. Watson obtained a rule to arrest the judgment, on the ground that the instrument set out in the first count, was not a promissory note, but an agreement, and should have been declared upon as such.

Wightman shewed cause.—The words, “and all fines, according to rule,” have no intelligible meaning, and may be rejected as surplusage. It would be impossible to declare upon these words as upon a separate contract. This case is distinguishable from *Smith v. Nightingale* (a); there the defendant promised to pay 60*l.*, “and also such other sums as, by reference to his books, might be due;” and as the latter words could not be rejected, since the whole constituted one entire promise, the instrument was too indefinite to be considered as a promissory note. Here the addition is insensible, and cannot vitiate the note.

Watson, contra, contended that the instrument was a special agreement, and could not be declared upon, without shewing the consideration.

PARKE, B.—This instrument is not a promissory note. It contains a promise to pay a specific sum, and something else. It seems to me, that the additional words are not insensible; they import that something further is to be paid. Probably they are pecuniary fines; but at all events they are something *plus* the money secured. Then, as these words cannot be rejected, the count is bad. As, however, there is a good count, and there is a general verdict for the plaintiff, he is entitled to claim a *venire de novo*, that the jury may assess the damages separately.

Rule accordingly.

(a) 2 Stark. 375.

DOE, dem. HOLDER v. RUSHWORTH and another.

MARTIN had obtained a rule, calling on *J. Rushworth*, the tenant in possession, to shew cause why, upon being admitted defendant, he should not, besides entering into the common rule, and giving the common undertaking, undertake, in case of a verdict for the plaintiff, to give him a judgment, to be entered against the real defendant, of the Term next preceding the time of trial; and also why he should not enter into a recognizance by himself, and two sufficient sureties, in a reasonable sum, to be fixed by the Court, and within any time the Court should direct, conditioned to pay the costs and damages which should be recovered by the plaintiff in the action; or why, in default thereof, judgment should not be entered for the plaintiff, pursuant to the Statute 1 Geo. 4, c. 87, s. 1.

It appeared from the affidavits, that this was a country cause, and that the notice at the foot of the declaration was in the following form: “Take notice,

In proceedings by ejectment under the 1 G. 4, c. 87, s. 1, the notice must require the tenant to appear in Court on the first day of Term, whether it be a country or a town cause.

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according to the form of the Statute in such case made and provided, that you and each of you, do appear in next *Trinity Term*, then and there to be made defendants in this action of ejectment; and then and there to enter into a recognizance by yourself, and two sufficient sureties, in such sum as the said Court shall think reasonable, conditioned to pay the costs and damages which shall be recovered in this action, if the said Court so order."

Platt and Archbold shewed cause.—The notice is defective (a). The Statute enacts, that the landlord may, at the foot of the declaration, address a notice to the tenant, requiring him to appear in Court "on the first day of the Term then next following." Here the notice requires the defendants to appear in next *Trinity Term*. Even assuming the form of notice to be correct, the application is too soon, as the parties have all the Term to appear. The non-appearance contemplated by the Statute, must mean a non-appearance according to the terms of the notice.

Martin.—The notice to appear is in next *Trinity Term*, "according to the form of the Statute in such case made and provided." It must, therefore, be construed with reference to the Statute, which requires the appearance to be on the first day of Term.

Per Curiam.—The notice does not follow the terms of the Act. If this were a notice in a town cause, in a common ejectment, we are informed by the master, that it would be insufficient. This is a country cause; and though in such case the notice is general, still, upon this proceeding, reference must be had to the Statute. We think that the directions of the Statute have not been complied with, and that the rule must be discharged.

Rule discharged.

(a) Other objections were taken, which the Court did not decide upon.

THOMAS v. JONES.

A motion in arrest of judgment, and it seems also for judgment *non obstante veredicto*, must be made within four days of the time of trial, if in Term; if not, within the first four days of the succeeding Term.

THIS cause came on for trial before *Williams, J.*, at the last Spring Assizes for the county of *Carnarvon*. After a full jury had appeared, the defendant challenged the array, upon the ground that the under sheriff, who had summoned the jury, was the attorney for the plaintiff. This was denied by the plaintiff, and the learned judge was applied to to appoint triers, which he declined to do. The challenge and answer were put upon parchment, and annexed to the record. The cause was tried, and a verdict found for the plaintiff.

Welsby, in *Easter Term* (but not within the four first days), obtained a rule *nisi* to arrest the judgment. He cited *The King v. Edmonds* (a).

Jarvis shewed cause.—First, the application is too late, not having been made within the four first days of the Term after the trial, *Lane v. Crockett* (b),

(a) 4 B. & Ald. 471.

(b) 7 Price, 566.

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Weston v. Foster (c). Formerly there appeared to be conflicting decisions in the three Courts, as to when it was necessary to move in arrest of judgment; but now the practice is settled by the 65th rule of *Hilary Term*, 2 Will. 4, which prescribes that "no motion in arrest of judgment, or for judgment, *non obstante veredicto*, shall be allowed after the expiration of four days from the time of trial, if there are so many days in Term; nor in any case after the expiration of the Term, provided the jury process be returnable in the same Term." It is said that this rule applies only to causes tried in Term, *Brook v. Finch (d)*; but it was made in order to assimilate the practice of all the Courts, and it cannot have that effect, unless it applies to all cases. But if the Court should think that it does not apply to a case like the present, then the old practice must be resorted to. This Court has always followed the practice of the Court of *Common Pleas*, and not of the *King's Bench*. But further, the application should not have been to arrest the judgment, but for a *venire de novo*, *Rex v. Edmonds*. Besides, defendant having gone on with the case, is not now entitled to apply to the Court, if he meant to insist upon the objection he should have withdrawn, *Brunskill v. Giles (e)*.

Welsby, contra.—Under the old practice this application might have been made at any time before judgment was actually signed.—[*Alderson, B.*—If the new rules do not apply, this is a *casus omissus*, and we must follow the old practice.]—In *Manning's Exchequer Practice*, 353, it is said, that the motion may be made at any time before judgment, and *Taylor v. Whitehead (f)*, and *The King v. Holt (g)*, are cited as authorities.—[*Alderson, B.*—Those are all cases in the Court of *King's Bench*; and the reason why that Court adopted such practice was, that, being a Court of criminal judicature, it was ready to interfere at any time before punishment.]—Then the practice has not been altered by the new rules. In *Brook v. Finch, Coleridge, J.*, appears to assume that the rule only applies to trials in Term. But, *secondly*, it is said that the application should have been for a *venire de novo*, and not to arrest the judgment; if so, that rule may be granted on this motion, since there is no rule which requires it to be made within the first four days of Term.—[*Parke, B.*—It would seem to follow the practice on motion in arrest of judgment.]—There are no express authorities on the subject.

PARKE, B.—I think that every application to arrest the judgment, and, I should say, also for judgment, *non obstante veredicto*, must be made within four days of the time of trial, if in Term, and if not, within the first four days of the succeeding Term. The object of the new rules was to assimilate the practice in all the Courts, in cases where it had previously differed; and if this case is not within them, still the application is too late, as reference must then be had to the old practice of this Court. It appears that formerly, in the *King's Bench*, the motion might have been made at any time before the judgment was signed; but in the *Common Pleas* the motion must have been made within four days of the return of the *distringas*, or *habeas corpora*. It appears, from the case of *Lane v. Crockett*, that in this respect the Court of

(c) 2 Bing. N. C. 701; 3 Scott, 155.

(d) 6 Dowl. P. C. 313; 1 Will., Woll. & Hod. 71.

(e) 2 M. & Scott, 41.

(f) 2 Doug. 475.

(g) 5 T. R. 436.

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Eschequer followed the practice of the *Common Pleas*, so that there is a direct authority for our decision. Nothing has been cited to the contrary, except a suggestion in Mr. *Manning's* book of Practice, but which is only supported by cases from the *King's Bench*. But if we look at the new rule, I think it will appear that it was intended to apply to every case; and that if a cause is tried out of Term, the motion should be made within the first four days of the Term next occurring after the trial. But whether this case falls within the rule or not, we have sufficient authority for saying that this Court formerly adopted the practice of the Court of *Common Pleas*, and not of the *King's Bench*. The rule is not an unwise one, as the one party has a remedy by writ of error, and the other has the benefit and security of bail in error.

BOLLAND, B.—In *Tidd's New Practice*, 538, it is said, “within the time limited by the above general rule, the defendant may move to set aside a verdict, and have a new trial, or after a point reserved, that a nonsuit may be entered, or he may move in arrest of judgment, and either party may move for a repleader, or *venire facias de novo*.” The present application, therefore, seems to me too late, as this Court has required the motion to be made within the four first days.

ALDERSON, B.—Notwithstanding the case of *Taylor v. Whitehead*, I think this application is too late. If this Court had followed the practice of the Court of *King's Bench*, and not of the *Common Pleas*, I should have considered whether it was not a reasonable construction of the new rule, that it should apply to all cases, whether tried in or out of Term, as I cannot see why the party is to have more than four days of the ensuing Term, because the cause happens to be tried out of Term.

Rule discharged.

NOEL v. DAVIS.

Where the declaration contains several counts, it is not necessary in a plea of set-off of a smaller sum, to specify to which particular part of the plaintiff's claim the set-off is to be applied.

ASSUMPSIT. The declaration contained a count for 100*l.* for work and labour; a second count for the same sum, for money paid; and a third count for the same sum, for money due on an account stated. The defendant pleaded *secondly*, “as to the sum of 27*l.* 13*s.* 4*d.*, parcel of the monies in the declaration mentioned, that the plaintiff, before and at the time of the commencement of the suit was and still is indebted to the defendant in a large sum of money, to wit, the sum of 27*l.* 13*s.* 4*d.* upon a certain bill of exchange, bearing date, to wit, on the 24th *October*, 1835, heretofore, to wit, on the day and year last aforesaid, made and drawn by one *E. J. Sydney*, upon and then accepted by the plaintiff, whereby the said *E. J. Sydney* requested the plaintiff, three months after the date thereof, to pay to his, the said *E. J. Sydney's* order the sum of 27*l.* 13*s.* 4*d.*, for value received, and which period of three months had elapsed before the commencement of this suit; and which said bill of exchange the said *E. J. Sydney*, to wit, on the day and year last aforesaid, indorsed and delivered to the defendant, which said sum of

27*l.* 13*s.* 4*d.* so due to the defendant as aforesaid, equals the said sum of 27*l.* 13*s.* 4*d.*, parcel, &c., and out of which said sum of money so due and owing from the plaintiff to the defendant as aforesaid, the defendant is ready and willing, and hereby offers to set off and allow to the plaintiff the said sum of 27*l.* 13*s.* 4*d.*, parcel, &c., according to the form of the Statute in such case made and provided. *Verification.*

Special demurrer, assigning for cause (amongst others) that the second plea does not sufficiently state against how much of the monies in each or either of the counts of the declaration the set-off is pleaded.

Jervis, in support of the demurrer.—This case resembles *Mee v. Tomlinson* (a). There the declaration contained counts for work and labour, for money paid, and for money due upon an account stated. The defendant pleaded, as to parcel of the monies in the two first counts mentioned, payment in accord and satisfaction; and the plea was held bad, for not shewing to how much of the sum in the first count, and to how much of the sum in the second, it was pleaded. Here it is difficult to know to what claim, or to what part of the claim the defendant applies his set-off.—[*Parke*, B.—He admits something to be due upon each count, but does not say how much. If he had averred the counts to be identical, the plea would have been bad.]—He might have averred that the account was stated in respect of the work and labour, *Mee v. Tomlinson*. If the plaintiff signed judgment for want of a plea, from which count is the 27*l.* to be deducted? and is he to take nominal damages on three of the counts?—[*Parke*, B.—The established form of a plea of tender is open to the very same objection; and it would be productive of great inconvenience if we were to lay down a different rule.

R. V. Richards, contrd.—The plea is pleaded as to part of all the sums in the declaration mentioned. It falls within the rule of a plea of tender, or payment as to part of the claim. Supposing this to be the only plea on the record, and that the plaintiff signed judgment for the part unanswered, on executing a writ of inquiry, he would have to prove something due on each count.

PARKE, B.—It would be most extremely inconvenient to bind the defendant to plead his set-off to any particular count. The plaintiff may withdraw his demurrer and plead.

Leave to amend.

(a) 4 A. & E. 262; 1 Har. & Woll. 614.

ALLEN v. PINK.

ASSUMPSIT. The first count of the declaration stated, that in consideration that the plaintiff would buy of the defendant a certain horse for a certain sum, to wit, 7*l.* 2*s.* 6*d.*, the defendant promised the plaintiff that the

the plaintiff would buy of the defendant a certain horse for 7*l.* 2*s.* 6*d.*, the defendant promised that he was a quiet worker, and would go well in spare harness: *Breach*, that the horse was not a quiet worker, and that the plaintiff was put to expense in keeping it. There were also counts for money had and received, and on an account stated—*Held*, that this was a case triable before the sheriff, under the Writ of Trial Act.

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The first count of the declaration stated, that in consideration that

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horse was a quiet worker, and would go well in spare harness. It then averred the purchase of the horse by the plaintiff, and the payment of the price, and alleged, as a breach, that the horse was not a quiet worker, and would not go in spare harness, but on the contrary thereof, was unquiet and vicious, and became of no use or value to the plaintiff, whereby he was put to charges and expences in keeping and taking care of it. There were also counts for money had and received, and upon an account stated. To the plaintiff's damages of 20*l.*

The defendant pleaded; *first, non-assumpsit*, to the whole declaration; *secondly*, to the first count, that the horse was a quiet worker, and would go well in spare harness, upon which issue was joined. The cause was tried before *Arabin*, Serjt., at the Sheriff's Court, in *London*, under a writ of trial, obtained by consent of both parties. It appeared, that in the month of *April*, the plaintiff went to look at the horse in question, at *Aldridge's Repository*, when the defendant, speaking of the horse, said, "That if he did not work well, and go quietly in spare harness, the plaintiff was to send him back, and he should have his money returned." After some further conversation, the plaintiff bought the horse for 7*l. 2s. 6d.*, which he paid when the defendant gave him the following memorandum:—

"*April 18th, 1838.*

"Bought of *G. Pink*, a horse for the sum of 7*l. 2s. 6d.*

"*G. Pink.*"

It afterwards appeared, that the horse was vicious and unquiet, and not a good worker, upon which the plaintiff sent him back, and demanded his money again, which was refused. There was an indorsement on the writ, claiming 7*l. 2s. 6d.*, and the particulars of demand were as follows: "On the *indebitatus* counts, the plaintiff seeks to recover 7*l. 2s. 6d.*, the price of a horse, which sum was fraudulently received by the defendant, under colour of a contract of sale thereof to the plaintiff, with a warranty which the defendant knew to be false, and which horse the defendant has subsequently received back."

A verdict having been found for the plaintiff for 7*l. 2s. 6d.*,

Byles obtained a rule to set aside the verdict, and for a new trial, on the ground; *first*, that the Sheriff had no authority to try the case; *secondly*, that as the terms of the contract were ascertained by the bought note, evidence of the warranty was inadmissible; and *thirdly*, that the evidence did not prove the warranty alleged in the declaration.

Gurney shewed cause. It is submitted, that the judge had jurisdiction to try this case. The 17th section of the 3 & 4 *Will. 4*, c. 42, does not prohibit a case, like the present, from being tried before the sheriff. There is nothing to shew that this is not a "debt or demand" under 20*l.* As the judge's order was obtained by consent, it must be assumed that all circumstances concurred to give the sheriff jurisdiction. *Watson v. Abbott (a)*, *Smith v. Brown (b)*, *Edge v. Shaw (c)*, will, perhaps, be cited on the other side, but they were all cases of *tort*; and there is no authority, that an action of

(a) 2 Dowl. P. C. 215.
 (b) 5 Dowl. P. C. 736.

(c) 4 Dowl. P. C. 189.

assumpsit, under circumstances like the present, is not within the Act. *Price v. Morgan* (d), is in point, there the first count of the declaration stated, that in consideration that the plaintiff would send a pony to the defendant, and would sell and deliver it to A., the defendant undertook that he was authorized by A. to purchase it on his behalf, that the plaintiff sent the pony to the defendant and was willing to sell it to A., but that the defendant had no authority from A. to purchase it. The second count was a similar one, but stating that the defendant undertook himself to purchase the pony. There was also an indebitatus count, for a pony sold and delivered; and it was held, that this was a record which might be sent by writ of trial, before the sheriffs; and *Parke, B.*, said, "I am of opinion, that the action was, in substance, for the price of the pony, and therefore, within the Act; and if it were not, I should hesitate, when the writ has been obtained by the plaintiff himself, to grant a new trial on the ground of misdirection in the under sheriffs. The same point was certainly mentioned in the argument in *Watcon v. Abbott*, but from the observations of *Bayley, B.*, and the rest of the Court, they do not appear to have sufficiently considered it. Therefore, as at present advised, I am disposed to discharge the rule on that ground. It is not necessary, however, to give a direct opinion on that, because, I think, in substance, that the case was within the Act." Here the verdict was for 7*l.* 2*s.* 6*d.*, the price of the horse. The court then called upon

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Byles in support of the rule.—The 17th section of the 3 & 4 *Will.* 4, c. 42, exacts, "That in any action depending in any of the superior Courts, for any debt or demand on which the sum sought to be recovered, and indorsed on the writ of summons, shall not exceed 20*l.*, it shall be lawful for the Court, &c., or any judge, if such Court or judge shall be satisfied that such trial will not involve any difficult question of fact or law, to order and direct that the issue joined shall be tried before the sheriffs, &c." On referring to the rule of *H. T.*, 2 *Will.* 4, it will appear what the meaning of the words "debt or demand" in the Statute are. The rule prescribes, "that upon every bailable writ and warrant, and upon the process, or any copy served for the payment of any debt, the amount shall be stated, and the amount of what the plaintiff's attorney claims for the costs of such writ or process, arrest or copy and service, attendance to receive debt and costs." The 17th section of the Act has reference to this rule.—[*Lord Abinger, C. B.*—What meaning do you give the word demand?—The words "debt or demand," are used in the Bankrupt Act. Yet, unliquidated damages cannot be proved under a *fiat*. They are also to be found in many Acts establishing Courts of Requests, but there the interpretation now contended for, has never been put upon them. In *Smith v. Brown*, which was an action against a carrier for negligence, the cause was tried, by consent, before the under sheriff of *Bristol*, and this Court held, that the trial was a nullity, and that no judgment could be given. If the verdict had been taken on the two last counts, there might have been less ground for the objection, but all the evidence applied to the first count only.

Secondly, as the contract was reduced to writing, no evidence of a parol warranty was admissible, *Greaves v. Ashlin* (e).

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Lastly, the contract proved was not a warranty,¹ but a mere conditional contract, that if the horse was not a good worker, the plaintiff might send him back. Upon the warranty of a specific chattel, the purchaser cannot rescind the contract, but must bring his action for damages, *Street v. Blay* (f).

LORD ABINGER, C. B.—The case of *Price v. Morgan*, is very analogous to the present. That was an action of *assumpsit*, and the Court there thought that the word “demand,” was *ejusdem generis* with that of debt, and that where it appeared on the face of the declaration, that the demand was for a sum certain, such a case might reasonably be considered within the Act. I think we ought to adhere to that decision, which was not a stronger case than this. There the action was brought for damages, here also it is for the breach of a warranty to go well in harness, which would be limited by the price of the horse. In my opinion, this case is clearly within the spirit of the Act. As to the second point, it is true, as a general principle, that where there had been a parol contract, which is afterwards reduced to writing, that writing must be looked to, to ascertain the terms of the contract, but here there was no evidence of an agreement by the plaintiff, that the whole contract should be reduced to writing. The paper drawn up is merely a memorandum or an informal receipt. As to the last point, it was a question for the jury, whether this was not a conditional sale, and I think the jury have very probably drawn the right conclusion

BOLLAND, B.—But for the case of *Price v. Morgan*, I should have doubted whether this was a case within the Act. I always considered it limited to money demands. As, however, there is authority in point, restrictions should not be placed upon the Act, especially when it is considered that two objects are contemplated by it, namely, the lessening of expence, and facility of trial.

ALDERSON, B.—I consider the first point determined by *Price v. Morgan*. This case does not fall within the principle of *Smith v. Brown*, for it is in fact, an action for the price of the horse only, and the plaintiff cannot recover more than that amount. On the other points I concur.

Rule discharged.

(f) 2 B. & Adol. 456.

JONES and another v. SENIOR.

To a declaration on two bills of exchange drawn by M.

upon and accepted by the defendant, and indorsed by M. to the plaintiffs, the defendant pleaded, that being in embarrassed circumstances, by an instrument in writing, he agreed to pay M. and his other creditors a composition of 7s. in the pound. The plea averred payment of the composition, and that before the commencement of the suit, M. paid to the plaintiffs sums of money sufficient to satisfy all consideration whatever for or in respect of the bills, and all money due from him to the plaintiffs in respect of the bills, in full satisfaction and discharge of the bills, and of all claims and demands whatsoever in respect of them. *Replication, de injuriis*.—*Held*, that the replication was bad, as the plea amounted to matter of discharge, and not of excuse.

ASSUMPSIT. The first count was on a bill of exchange, dated 20th December, 1834, drawn by one J. Mabury, upon and accepted by the

defendant, for 300*l.*, payable two months after date, to the order of *J. Mabury*, and by him indorsed to the plaintiff. The second count was on a similar bill for 220*l.*, dated 24th *December*, 1834. The first two pleas denied the indorsement by *Mabury*.

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The defendant pleaded; *thirdly*, that before and at the time of accepting the bills in the declaration mentioned, the defendant was indebted to the said *J. Mabury*, in the sum of 807*l.*, and that the said bills respectively, were accepted on account, and in respect of 520*l.*, parcel of the same debts: and the defendant further saith, that after the accepting, as in the declaration mentioned, of the said bills, and before the said bills or either of them became due and payable according to the tenor and effect thereof respectively, to wit, on the 10th *February*, 1835, he, the defendant, was also indebted to divers other persons, to wit, (naming them) in divers sums of money, and then was embarrassed in his circumstances, and unable to pay his debts in full, and thereupon the defendant, being so indebted, as aforesaid, by a certain instrument in writing, then made between, and among, the said *J. Mabury*, and the said several other persons of the first part, and the said defendant of the second part, and bearing date on the day and year last aforesaid, and which said instrument was then subscribed, as well by the said other persons, who then respectively set under thereunto, and opposite to their respective names, the respective amounts of their said respective debts, as by the said *J. Mabury*, who then set under thereunto and opposite to his name, the said sum of 807*l.*, reciting that the defendant was indebted to the several persons, parties thereto of the first part, in the several sums of money thereunder set opposite to their respective names, and that a proposal had been made by the defendant to the said several parties thereto of the first part, and agreed to by them, that the defendant should, on or before the 1st *March* then next, pay to the several creditors, in the manner thereafter mentioned, a composition of 7*s.* on the amount of their said respective debts, and that the defendant should relinquish and transfer to and for the benefit of the said creditors, certain claims of him, the defendant, upon certain mercantile houses in *Great Britain* and parts abroad, which composition of 7*s.* in the pound, and transfer of such claims, were to be in full satisfaction and discharge of the said several debts owing to the said creditors, parties thereto of the first part as aforesaid, who had agreed, in consideration thereof, to enter into and execute that instrument; and further reciting, that by an indenture, bearing even date therewith, the defendant had relinquished and transferred the said several claims to the said creditors, parties thereto of the first part, in consideration of the premises and of the said composition, the said several creditors, parties thereto of the first part, did thereby for themselves severally and respectively promise and agree with and to the defendant, that after delivering on or before the 1st day of *March*, then next, to the said several creditors, or one or more of them, for and on account of the rest of the said indenture, bearing even date therewith, and payment on or before the said last mentioned day, to the said several creditors, parties thereto of the first part of the said composition of 7*s.* in the pound, on their said several debts, in manner following, namely, 5*s.* in the pound in cash and 2*s.* in the pound by the defendant's acceptances, at six months' date, with a sufficient personal guarantee for the due payment thereof, and which was to be in full discharge of the said several debts owing to them respectively, by the defendant, they, the said

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several creditors or any of them, their or any of their heirs, executors, administrators, principals, partners or assigns, should not nor would sue, arrest, attach, imprison, or prosecute the defendant, his heirs, executors, or administrators, or his or their lands or tenements, goods or chattels, or any of them, for or on account of any claims, debts, or demands whatsoever, then due to or claimed by them or any of them, from the defendant; and that in case they or any of them, the said several creditors, parties thereto of the first part, their or any of their heirs, executors, administrators, or assigns, principals, partners, or assigns, should act contrary thereto, that instrument should be a full, absolute, and sufficient release and discharge of and for such accounts, claims, debts, and demands; and the defendant, his heirs, executors, and administrators, and his and their lands, tenements, goods, and chattels, should be for ever acquitted, released, and discharged therefrom; and that instrument might be pleaded in bar to any action or suit accordingly; and also, that they, the said several creditors, parties thereto respectively, should and would, on tender or payment of the composition aforesaid, give and deliver to the defendant, his executors, administrators, and assigns, all bonds, bills, notes, and other securities held by them, the said several creditors respectively, for or in respect of their said several debts, save and except any such to which there might happen to be parties jointly or collaterally liable. And the defendant further says, that by a certain indenture, bearing even date with the said instrument in writing, and then made between the defendant of the one part, and *R. Saunders* and *J. Bishton* of the other part, and then sealed with the seal of the defendant, he, the defendant, assigned, relinquished, and transferred to the said *R. Saunders* and *J. Bishton*, the said claims of him, the defendant, upon the said mercantile houses in *Great Britain* and parts abroad, and for the benefit of the said creditors, parties to the said instrument in writing. And the defendant further says, that afterwards and before the 1st *March*, 1835, to wit, on the 10th *February*, 1835, the defendant delivered the said indenture to divers, to wit, two of his said creditors, to wit, the said *R. Saunders* and *J. Bishton*, on account of the rest of his said creditors. And the defendant further says, that after the making of the said indenture in writing, and before the 1st *March*, 1835, he, the defendant, at the request of the said *J. Mabury*, paid to a certain person, to wit, one *W. Fellowes*, for the said *J. Mabury*, 5s. in the pound on the said debt of the said *J. Mabury*, to wit, on the sum of 807*l.*, to wit, the sum of 201*l.* 15*s.*, and then and before the said 1st *March*, 1835, to wit, on the said 10th *February*, 1835, at the like request also, delivered to the same person, for the said *J. Mabury*, his, the defendant's, acceptance, with a sufficient personal guarantee for the due payment thereof, at six months' date, of 2*s.* in the pound on the said debt of the said *J. Mabury*, to wit, on the said sum of 807*l.*, to wit, for the sum of 80*l.* 14*s.*, whereof the said *J. Mabury* then had notice, and then was requested to deliver up to the defendant, the said two bills in the declaration mentioned, and thereupon the said *J. Mabury* then requested, and the defendant, at the request of the said *J. Mabury*, then agreed that the said *J. Mabury* should have further time to procure and deliver up to the defendant the said two bills. And the defendant further says, that after the making of the said instrument in writing, and before the said 1st *March*, 1835, to wit, on the said 10th *February*, 1835, the defendant paid to the said several creditors, parties thereto of the first part, the said composi-

tion of 7s. in the pound on their said several debts, in manner following, namely, 5s. in the pound in cash, and 2s. in the pound by the defendant's acceptances at six months' date, with a sufficient personal guarantee for the due payment thereof respectively, of all which premises the plaintiff then had notice. And the defendant avers, that afterwards, and long before the commencement of this suit, to wit, on the said 10th *February*, 1835, the said *J. Mabury* paid to the plaintiffs, and they, the plaintiffs, then received from and on account of the said *J. Mabury*, divers sums of money, in the whole amounting to a sum sufficient to discharge and satisfy all consideration whatsoever, for and in respect of the said indorsement of the said bills in the declaration mentioned respectively, and all sums of money whatsoever, then due from or by the said *J. Mabury*, to the plaintiffs, in respect of the said bills or either of them, or otherwise, howsoever, and all claims and demands whatsoever of the plaintiffs, in respect of the said bills or either of them, or otherwise, on the said *J. Mabury*, to wit, the sum of 2000*l.* in full satisfaction and discharge of the said bills, and of all claim and demand whatsoever, in respect of them or either of them, or otherwise; and so the defendant says, that the plaintiffs then became, and from thenceforth continued to be, and at the time of the commencement of this suit, were the holders of the same bill respectively, without any consideration whatever, in respect of their being holders of the same bills or either of them, or to entitle them to the security or benefit thereof, or of either of them in anywise, and in fraud of the defendant and his said creditors. *Verification.*

Replication, de injuriâ; to which there was a demurrer and joinder.

The points marked for argument by the plaintiffs were that the plea is ill, because it does not allege that *J. Mabury* was holder of the bills when the instrument of composition was entered into, nor that the plaintiffs were otherwise than *bonâ fide* holders for value, and because it must be taken that the payments by *J. Mabury* to the plaintiffs, were before the bills fell due, and because it does not allege that *J. Mabury* paid the bills, but merely alleges that he paid them monies sufficient to pay them, and because it alleges an insufficient excuse for the non-payment of the bills to the plaintiffs.

The defendant's points were, that the replication is ill because it purports to deny the excuse set up by the plea, when no excuse for non-payment of the bills when due is alleged, and though the plea shews matter in discharge of an undeniable liability, and breach of promise to pay according to the tenor and effect of the bills and indorsement; because it assumes that the material matters of the plea are merely in excuse, although those matters do not, as pleaded, appear, nor are by any matters alleged in the replication shown to be merely matter in excuse; because the defendant has, by his plea, shewn and claimed an interest in the bills on which the action is founded, and because the replication is double and multifarious.

Henderson, in support of the demurrer.—This is not a plea in excuse, but in discharge of an undenied liability. It is needless to cite authorities in support of the proposition, that unless the plea shews matter in *excuse*, the replication *de injuriâ* is inapplicable. That was clearly established in *Crogate's Case* (a), and the law there laid down has been recognized by all the

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subsequent authorities. Here the plea, in fact, amounts to this, that the plaintiffs are not entitled to recover, because they have already received satisfaction from the drawer of the bill.—[*Parke, B.*—One part of the plea seems to be matter of excuse, and the other accord and satisfaction. Would the plea be good, if all about the composition were struck out?—Probably it would not, as the plea must shew that neither the drawer or indorsee could sue; but then, the plea goes on to state, that the terms of the deed were complied with, which, as regards the indorsee, is mere matter of discharge. This case does not resemble *Isaac v. Farrar (b)*, where the plea merely excused the non-payment on the ground of want of consideration for the defendant's indorsement. The plea does not deny the obligation to pay the bills when they became due, and the matter which has subsequently arisen, is clearly not in excuse.—[*Lord Abinger, C. B.*—The pleas do not aver that *Mabury* paid the plaintiffs after the bills became due.]—It expressly states that *Mabury* paid the plaintiffs the sum of 2000*l.*, “in full satisfaction and discharge of the same bills, and of all claim and demand whatsoever, in respect of them or either of them, or otherwise.” That is a sufficient averment that the payment was made after the bills were due.—[*Parke, B.*—I think that averment shews the bills were paid after they became due.]

Channell, contrâ.—It is conceded, that the rule laid down in *Crogate's Case* must govern this, but it is contended, that this is not a plea in discharge. It consists of matter of excuse, and shews a cesser of all consideration on the part of the plaintiffs. Suppose the payment had been made during the time the bill was running, it would have been clearly matter of excuse, *Reynolds v. Blackburn (c)*. It is by no means clear, that the payment was made after the bills became due, but admitting that to be the fact, a payment by the drawer would not discharge the acceptor, who would be still liable at the suit of the holder for nominal damages.—[*Parke, B.*—The plea says, that the plaintiff received the money in satisfaction of all claims and demands whatsoever, in respect of the bills.]—Where the effect of the plea is to destroy the consideration, or to shew that no consideration ever existed, that is a plea in excuse, *Isaac v. Farrar*.—[*Parke, B.*—That was a case of defect of consideration before the bill became due.]—Here a composition is made with the drawer while the bill is running, to which the plaintiffs are not privy. It was then necessary to go further and destroy the consideration between the drawer and the plaintiffs. The effect of the plea is in excuse, it states facts which shew that the plaintiffs continued to hold without consideration.

PARKE, B.—It seems to me, that this is in effect a plea of accord and satisfaction; there is nothing in the plea to shew that the defendant was not liable to pay the bills when they became due. The meaning of the plea is this, that *Mabury* has paid every thing in full, but that alone will not do, as the plaintiffs might hold as trustees for *Mabury*. The plea is in substance this, that though I did break the contract by not paying the bills when they became due, yet, by what has subsequently taken place between the plaintiffs and *Mabury*, I am discharged from all liability. Whether or no the plea

would have been an answer to the action, if the last averment stood alone, it is not necessary to decide. That clearly is not matter of excuse. The plaintiffs may have liberty to amend.

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ALDERSON, B.—The plea is in discharge, and not in excuse.

Lord ABINGER, C. B.—concurred.

Leave to amend.

CORNER v. SHEW, Executor, &c.

ASSUMPSIT. The first count stated that the defendant, as executor, was indebted to the plaintiff for goods sold and delivered to him, as executor; second, for work and labour done for the defendant, as executor; third, for money paid for the use of the defendant, as executor; fourth, for money due from the defendant, as executor, upon an account stated, and that the defendant, as executor, promised to pay. *Pleas: non assumpsit and ne unques executor.*

A verdict having been found for the plaintiff, *Channell*, in *Michaelmas Term*, obtained a rule to arrest the judgment, which rule was made absolute in *Hilary Term* last (a). *Platt* then obtained a rule to shew cause why a *venire de novo* should not be granted. The case came on for argument in this Term, when

Channell shewed cause.—The plaintiff was too late with his motion for a *venire de novo*; he ought to have moved for the rule whilst the motion for arresting the judgment was pending, and ought not to have waited for the opinion of the Court on that motion. *Secondly*, no case can be produced of a *venire de novo* being awarded on account of a misjoinder of counts. It will indeed be granted where damages are assessed generally upon several counts, one of which is bad; but here the whole declaration is tainted. He cited *Leach v. Thomas* (b); *Holt v. Scholefield* (c); *Duncombe v. Wingfield* (d); *Corbett v. Packington* (e).

Platt, contra.—The plaintiff is not too late in his present application. There is no case of a *venire de novo* being argued before the motion in arrest of judgment.—[*Parke, B.*—We have no difficulty on that point.]—It must be admitted that there is no authority in favour of granting a *venire de novo* in a case of misjoinder of counts. But as the Court will grant it where a general verdict has been given for the plaintiff, upon one good and one bad count, it seems strange that a plaintiff, who has two good counts that are misjoined, should be in a better situation than a party who has one good and one bad

Where a declaration contains several counts, which are misjoined, and the jury find a verdict for the plaintiff on all the counts, the Court will not grant a *venire de novo* on the ground of the misjoinder.

The Court having, at the instance of the defendant, arrested the judgment on the ground of misjoinder, the plaintiff immediately applied for, and obtained a rule, to shew cause why a *venire de novo* should not be granted:—*Held*, that he was not too late in his application; and that he was entitled to be heard in support of the rule.

(a) This case is reported in 1 Horn & Hurls. 65; 3 Mee. & Wel. 350.

(b) 2 Mee. & Wel. 427; 1 Murph. & Hurl. 119; 5 Dowl. 612.

(c) 6 T. Rep. 691.

(d) Hob. 254.

(e) 6 B. & Cr. 268.

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count. The verdict is incorrect; for if the jury, instead of finding generally on all the counts, had severed the damages, the plaintiff might have remitted them on some of the counts. As it is there is an uncertainty, which prevents the Court from acting.—[*Alderson, B.*—It is the duty of the jury to find damages on all the counts; the only question is, if they were bound to sever.]—*Platt* cited *Lewis v. Clement* (f), 6 Geo. 4, c. 50, s. 60; *Witham v. Lewis* (g), *Tidd's Practice*, 922, 6th edit.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—In this case a rule was pronounced, in *Easter Term* last, to arrest the judgment, on the ground of misjoinder of counts, two being against the defendant in his own right, and one against him as executor. During the same term a rule *nisi* was obtained to vary the former rule, and for a *venire de novo* to issue; and cause was shewn against the rule.

One objection was, that the application came too late, after the former rule had been pronounced; but the Court disposed of that objection on the argument.

The other was, that a *venire de novo* could not be awarded in such a case. It had been decided in *Leach v. Thomas*, that where general damages are assessed on a declaration containing one breach ill assigned, a *venire de novo* ought to be awarded; a question which, before that time, had been considered doubtful, as there were apparently conflicting authorities upon it. Yet it is remarkable that such a doubt should exist, as this case had been provided for by an ancient rule of the Court of *King's Bench, Michaelmas Term*, 1654, which states, "that where a verdict finds entire damages, where damages are the principal, and part not actionable, the judgment may be arrested; yet by a rule of Court, a *venire facias de novo* may issue, as upon an ill verdict, and upon the new trial, the party may sever his damages." And a similar rule exists of the date of 1654, in the *Common Pleas*, which was acted upon in that Court, in the cases of *Smith v. Howard* (h), and *Anger v. Wilkins* (i); and see *Eddowes v. Hopkins* (j).

But it is admitted that there is no precedent of such a proceeding where there is a misjoinder of counts, and the damages have not been severally assessed; and judgment has been arrested absolutely in some reported cases. It was done in *Corbett v. Packington*; and judgment was reversed for a similar objection, *Herrenden v. Palmer* (k). No question appears to have been raised in either case as to the right of duty of the Court to award a *venire de novo*, and therefore none of these cases are decisive authorities upon this question. But the absence of any intimation in the cases or books (and we have not been able to find any) as to the power to grant a *venire de novo* in such a case, makes us pause before we adopt this proceeding. The difference between this case and that provided for by the rule of Court, and sanctioned by the decision in *Leach v. Thomas*, is slight; still there is a difference in the principle; and we do not feel ourselves, in the absence of all authority, warranted in disregarding it.

(f) 3 B. & A. 702.
 (g) 1 Wils. 48.
 (h) Barn. notes, 478.

(i) *Ibid.* 480.
 (j) 1 Doug. 376.
 (k) 1 Hob. 88.

A *venire de novo* can only be granted on what appears to the Court on record, and unless the record warrant it, it will be error to grant it; and it proceeds (where the jury have been regularly summoned and impanelled) on a suggestion of their misbehaviour, *Lewis, dem. The Earl of Derby v. Witham (1)*. Where there is an imperfect or defective verdict, on which, if perfect, the Court could give judgment, the jury have misconducted themselves, and the case of a general assessment of damages on a declaration with a bad count or breach, may fall within this rule; for it may be presumed that the jury were instructed as to the law, and told to disregard the part of the declaration which was not actionable, or to assess the damages severally; and in such a case an award of *venire de novo* may be made, "as on an ill verdict," to use the language of the old rule. In that case the verdict, if good and confined to the good count or breach, or capable of being applied to it, would at once authorize and require a verdict for the plaintiff, and the Court *ex officio* would be bound to award it, overlooking the bad count or breach. But where the counts are both good, but misjoined, the jury ought to assess the damages on all the counts. Each is actionable; and but for the misjoinder, judgment might be given on each; and if the damages had been assessed on each severally, that would have been of no avail, for the Court could not have given any judgment at all *ex officio*; and further acts of the plaintiff, in releasing the damages on one or the other counts, would be necessary. If, indeed, it were a matter of discretion in the Court to grant or refuse such a writ, it would admit of a question, whether it would not be reasonable to do it, in order to enable the plaintiff to make an election, which he had omitted to make at the proper period before; and in that case it would be fitting also, to consider whether he ought not to pay the costs of such a proceeding. But it is clearly a matter of duty on the Court to grant the writ, or to refuse it; an improper refusal is a ground of error, and it cannot be well in error in the Court to refuse a writ, the granting of which would not necessarily enable the Court to give a judgment one way or the other.

For these reasons we think that the rule must be discharged.

Rule discharged.

(1) Stra. 1185.

WILLIAMS v. MOSTYN, Bart.

CASE against the sheriff of *Flintshire*, for an escape. The declaration stated that the plaintiff sued out a writ of *capias* against one *Langford*, and directed the same to the defendant, the sheriff of *Flintshire*, who arrested *Langford*; "yet the defendant, not regarding the duty, &c., but wrongfully and unjustly contriving and intending to injure the plaintiff, and to delay and injure him in and from the recovery of his said debt, afterwards, and after the time when the said writ ought to have been returned by the said sheriff, and after the time for putting in bail for the said *Langford* had expired, to wit,

ings, accompanied by the gaoler, to support objections before the revising barrister. The creditor had sustained no damage from the absence of the debtor.

Held, first, that the sheriff was guilty of a breach of duty.

Secondly, that the creditor, having sustained no damage in fact or in law, could not maintain an action against the sheriff.

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A debtor being in custody on *mesne process*, the sheriff, after the return of the writ and the expiration of the time for putting in bail, allowed him to be absent from the prison during two morn-

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&c., without the leave and licence, and against the will of the plaintiff, and without any special bail having been put in for the said *Langford*, as required by the said writ, voluntarily suffered and permitted the said *Langford* to escape and go at large, wheresoever he would, out of the custody of the now defendant, so being such sheriff as aforesaid, the said debt for which the said *Langford* was so arrested as aforesaid, and every part thereof then and still being wholly unpaid to the plaintiff; and the plaintiff, in fact, saith, that the said *Langford* did not cause special bail to be put in for him in the said Court in the said action, or otherwise obey the said writ, according to the said exigency thereof, but therein wholly failed and made default, whereby the plaintiff hath been and is greatly injured and delayed in the recovery of his aforesaid debt, and is likely to lose the same, and thereby also the plaintiff hath lost and been deprived of the means of recovering his costs and charges, by him paid, laid out, and expended in and about his said suit, so commenced and prosecuted against the said *Langford* as aforesaid, amounting, &c."

Plea, not guilty.

At the trial, before *Alderson*, B., at the *Middlesex* Sittings in *Hilary Term*, 1838, it appeared that *Langford*, previously to his arrest, had served numerous persons with notices of objection to their claim to vote at the election of members of parliament for the county of *Flint*; that after the return of the writ, and after the time for putting in special bail had expired, the defendant permitted *Langford* to attend the revising barristers' court, to support his objections. *Langford*, accompanied by the gaoler, left the prison on the mornings of the 3d and 4th *October*, and returned on the evenings of the same days. The plaintiff had not sustained any damage by his absence. *Alderson*, B., being of opinion that the plaintiff was entitled to recover, the jury found a verdict for him, damages, 1s.; the learned judge reserving to the defendant leave to enter a nonsuit. *J. Jervis* having obtained a rule accordingly,

Wightman shewed cause.—A sheriff having taken a prisoner in execution on *mesne process*, is bound, after the return of the writ, and after the expiration of the time for putting in bail, to keep him in the same custody as on final process; and by permitting him to go at large for the shortest period of time, he will render himself liable to an action for an escape. It is true, that a sheriff is not subject to an action for merely allowing a prisoner to go at large after his arrest, provided he produces him before the return of the writ. And the reason is plain, because the plaintiff could take no step until the appearance of the prisoner in Court, and therefore could not be inconvenienced by his being allowed to go at large. This distinction between arrests on *mesne* and *final* process, is supported by the language of *De Grey*, C. J., in *Hawkins v. Plomer* (a). "In arrests upon *mesne process*, it is sufficient if the sheriff brings in the body on the day of the return; and therefore in *Noy* p. 72 (b), a distinction is taken; that in actions for escape on *mesne process*, the writ shall surmise that *ad largum ire permisit, et non comparuit ad diem*. On process of execution, *ad largum ire permisit*, is sufficient. And so are the precedents, *Rast.* 171; 1 *Saund.* 35; 2 *Saund.* 100, all of which are for escapes between the caption and the return of the writ." *Atkinson v. Mat-*

(a) 2 W. Black. 1048.

(b) *The Sheriff of Nottingham's Case.*


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son (c), *Lewis v. Morland* (d). Here the sheriff is charged with allowing the prisoner to go at large *after* the return of the writ; and that act is a breach of duty on his part. For after the return of the writ, and the expiration of the time for putting in bail, the plaintiff would be at liberty to take proceedings against the prisoner. He might, in pursuance of 4 & 5 *W. & M.*, c. 21, s. 2, wish to deliver a declaration to him, or he might have occasion to bring him before the Court by *habeas corpus*; and therefore the sheriff is bound to have the prisoner ready at a moment's warning.—[*Alderson*, B.—Suppose the prisoner had been committed to the custody of the marshal, and the marshal had allowed him to go out of prison, would that be an escape? The sheriff, after the expiration of the eight days, stands in the situation of a marshal.]—*Flanck v. Anderson* (e), which will be cited on the other side, has no application; for in that case there could hardly be said to be an escape, since the prisoner remained in the custody of the sheriff, whose lock-up house must be considered his proper prison. Here the prisoner is taken from the gaol to the revising barrister's court. The present defendant would not have been allowed to put in bail after the commencement of this action, *Fuller v. Prest* (f).

The defendant having been guilty of a breach of duty, the plaintiff is entitled to recover, although he has sustained no actual damage; for in *Barker v. Green* (g), the Court held, that "if there was a breach of duty, the law would presume some damage." *Blofield v. Payne* (h), shews that a party may be entitled to some damages, although he has sustained no specific damage.

J. Jervis and Whateley, contrâ.—The question is, whether the sheriff, after the return of the writ, and the expiration of the time for putting in bail, is bound to keep a prisoner on *mesne process in arctâ et salvâ custodiâ*. All the old cases of escape, *Platt's Case* (i); *Balden v. Temple* (j); *Roll. Abr. "Escape,"* pl. 806; *Termes de la Ley*, "Escape;" *Vin. Abr. "Escape,"* apply to final process; and the strict custody enjoined by them is inapplicable to a prisoner detained on *mesne process*; for it appears by *Boyton's Case* (k), that a sheriff may keep those who are in execution in fetters and irons.—[*Parke*, B.—The resolution of the judges, in *Cro. Car.* 466, requiring prisoners to be kept *in salvâ et arctâ custodiâ*, may apply to *mesne* as well as *final process*.]—There is no authority to shew that a sheriff is bound to keep a prisoner on *mesne process*, as strictly as a prisoner on final process. It is sufficient if he produces him at the summons of the plaintiff. Here the prisoner was in the legal custody of the sheriff, for he was accompanied by the gaoler, and did not pass the limits of the county. *Secondly*, no action can be maintained in this case, unless actual damage is proved. This may be inferred from the judgment of *Abbott, J.*, in *Lewis v. Morland*.—[*Alderson*, B.—Suppose a party is, by the act of a sheriff, placed in a worse situation than he ought to be in, has he not sustained some damage, although he may not wish to avail himself of a better situation?]*—In Brown v Jarvis* (l),

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| (c) 2 T. Rep. 172. | (i) Plowd. Com. 35. |
| (d) 2 B. & Alder. 56. | (j) Hob. 202. |
| (e) 5 T. Rep. 37. | (k) 3 Coke Rep. 44. |
| (f) 7 T. Rep. 109. | (l) 1 Mee. & Well. 708; 2 Gale, 97; |
| (g) 2 Bing. 317; 9 B. Moore, 584. | 1 Tyrw. & Gran. 1033. |
| (h) 4 B. & Adol. 410; 1 Nev. & Man. 353. | |

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Lord *Abinger*, C. B., intimated that the action could not be sustained, without proof of actual damage.—[*Alderson*, B.—It was unnecessary there to decide that point.]—It is true, that in actions for invading the rights of common, where no actual injury has been sustained, the Court will presume damage; but that presumption rests on the ground, that the repetition of a trespass tends to establish a right. The case is the same in an action for crossing a paved yard, where no actual damage can be done. *Scott v. Henley* (m) establishes that, in a case of *mesne process*, a party “can only recover against the sheriff such damages as he can shew he has sustained.” *Barker v. Green*, which tends to prove the contrary, is very loosely reported; and the case of *Planck v. Anderson* was not cited in it. In *Marzetti v. Williams* (n) the judgment of the Court proceeded on the ground of the action being, in fact, brought for a breach of contract, for which nominal damages were recoverable.

Cur. adv. vult.

The judgment of the Court was delivered in this Term, by

PARKE, B.—In this case an action was brought against the sheriff for an escape, to which there was a plea of not guilty. It was tried before my Brother *Alderson*. The facts appeared to be, that the plaintiff issued a writ of *capias* against *Langford*, returnable on the execution thereof. On the 5th September, *Langford* was arrested, and bail above was not put in in due time. *Langford* continued in the custody of the sheriff; but on the 3d of October was out of the county gaol, attending the court of a revising barrister, in the charge of a sheriff's officer. This was the escape relied upon. It did not appear that the plaintiff had issued an *habeas corpus* to bring up the body of the defendant, in order to charge him with a declaration, nor that he had been prevented from declaring against him in the custody of the sheriff; and the jury negatived all actual damage. The learned judge directed a verdict for the plaintiff, with nominal damages, and certified to deprive the plaintiff of costs; but reserved liberty to move to enter a nonsuit. A rule to shew cause was granted, and two questions were very fully discussed on the argument. The first was, whether the sheriff was bound to keep prisoners in his custody after the return of *mesne process*, and before they are charged in execution *in arcta custodia* in his gaol. The second question was, whether the plaintiff could maintain this action, unless he had sustained actual damage.

That a debtor in execution must be kept in prison, and not allowed to go out, though with a keeper, is a matter beyond doubt, although it was slightly questioned at the bar. And the authorities in *Plowd.* 36, *Balden v. Temple*, *Small's Case* (o); *Dalton*, 561, *Boyton's Case*, *Roll. Abr.* 806, are distinct upon this point. And we think that the law is the same in the case of defendants in custody of the sheriff, after the return of the writ of *capias ad respondendum*, and before they are charged in execution. It is clear it is so with respect to those in the custody of the marshal, or warden of the *Fleet*, by the resolution of the judges, in *Cro. Car.* 466, and by the express provisions of the Statute 8 & 9 *Will.* 3, c. 27. With respect to

(m) 1 Moo. & Rob. 227.

(n) 1 B. & Adol. 415.

(o) 2 Bulst. 148.

(p) 3 Coke, 44, a.

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sheriffs, it is laid down to be a duty of the sheriff to carry his prisoner to the county gaol, by *Buller, J.*, in the case of *Planck v. Anderson*; and that he ought to do it at the return of the writ; but that is subject, of course, to the qualification introduced by the Lords' Act, 32 *Geo. 2*, c. 28, that a prisoner is not to be carried there until after twenty-four hours from his arrest. The Statute 4 & 5 *Will. & M.*, c. 21, by its recital shews that it was the practice, before the passing of the Act, that prisoners, after the return of the writ, should be in gaol; and its enactments provide for the delivery of a declaration to the gaoler or keeper of the prison, and not to any one else; thereby proving that the prisoner ought to be kept in prison after the return of the writ. We think, therefore, that the sheriff was wrong in permitting the prisoner to be out of the limits of the gaol.

The second question then arises, whether the fact of the prisoner being out of gaol, though with a sheriff's officer, be actionable, without proof of some damage. If the prisoner is in execution, there is no question about it; for it is clear that the creditor, "when he is ascertained to be such by a judgment, and he has charged the debtor in execution, has a right to the body of his debtor every hour, till the debt is paid (*p*)."
 He has a right to have the body in gaol; and the escape of a debtor, for ever so short a time, is necessarily a damage to him, and the action for an escape lies. Lord *Holt* says, in *Ashby v. White* (*q*), "every injury to a right imports a damage in the nature of it, though there be no pecuniary loss." But the question upon which we have entertained some doubt is, whether the plaintiff, before judgment, can maintain such an action upon proof of the escape alone: and upon this point the authorities are apparently conflicting.

We think that the action is not maintainable. The nature of the sheriff's duty, before the Statute 4 & 5 *Will. and Mary*, c. 21, was to keep the prisoner in gaol, after the return of the writ, ready to be removed at any time that the plaintiff chose, by *habeas corpus*, into the superior Court, there to be charged with a declaration. Since that Statute the nature of his duty is, to have him ready, either to be so removed, or to be declared against as in custody of the sheriff; and the right of the plaintiff is co-relative to the duty of the sheriff: it is a right to have the defendant in custody, whenever he chooses to remove or declare against him, in order that his suit may be conducted with due expedition. And Mr. Justice *Buller* states the nature of the sheriff's duty to be, that after the return of the writ, he must keep the defendant at his peril, in case the suit be delayed. There would, we think, be no doubt, that if the plaintiff had sued out his writ of *habeas corpus* during the defendant's absence from prison, and been prevented from executing it, or had offered to deliver a copy of the declaration during such absence, and had been prevented by the absence from doing so, he would have had a right of action, for then his suit would have been delayed; and delay of suit, however short, is necessarily a damage. The case of *Planck v. Anderson* is not to be understood as laying down a rule that any other damage is necessary, but only that damage to this extent is; for the judgment proceeds upon the assumption that the verdict of the jury was right; that there had been no delay; though Mr. Justice *Buller* intimates that it ought to have been to the con-

(*p*) Per *Buller, J.*, 5 T. R. 40.

(*q*) P. 14, new edit.

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trary. But if the plaintiff neither sues out a writ nor declares, his suit is not delayed, and there has been no impediment to the exercise of his right, for he has not chosen to exercise it. We think, therefore, that this is a case in which there has been no damage, in fact or in law; and we adhere to the authority of *Planck v. Anderson* rather than that of the more recent case of *Barker v. Green*, which is very shortly, and certainly inaccurately reported. It appeared that the sheriff had not the defendant in custody at the return of the writ, but had the day after. The judge left it to the jury to say what damage the plaintiff had sustained; observing, that he did not see what possible damage there could be. The jury found damage to the amount of one farthing; and the Court are said to have held, that if there was breach of duty, the law would presume damage, and yet to have also held, that the direction to the jury was correct, which, on that assumption, it could not have been. This must be an inaccuracy in the report (*r*). The case of *Planck v. Anderson* was not cited, nor the question as to the sheriff's duty discussed; and we think we ought not to give the same weight to this authority, as to the more fully reported case of *Planck v. Anderson*.

Rule absolute.

(*r*) See this case as reported in 9 B. Moore, 584, where the judge is represented as having directed the jury, that "unless the plaintiff could shew that he had sustained damages, the action could not be maintained;" whilst *Best, C. J.*, is made to say, that the plaintiff was entitled to nominal damages; and that he

was of opinion that the "case was properly left to the jury." The Court probably refused the rule, on the ground that, however wrong the direction of the judge might have been, the jury had not been misled by it, and were right in giving a verdict for nominal damages.

COMPTON v. TAYLOR.

The declaration set out the writ, which stated the action to be brought on promises. Then followed two counts which alleged the making of two bills of exchange by the plaintiff, and that the defendant accepted the bills, and promised the plaintiff to pay the same: there were also *indebitatus* counts, and the declaration concluded "whereby and by reason of the non-payment thereof, an action hath accrued to the plaintiff to demand and have of and from the defendant the said several monies respectively, amounting to the sum of 450*l.* above demanded:—*Held*, a good declaration in debt.

THE plaintiff declared as follows:—*Joseph Compton*, the plaintiff in this suit, by *William Smith*, his attorney, complains of *John Taylor* being detained at the suit of the said *Joseph Compton*, in the custody of the sheriff of *Surrey*, in an action on promises, and he demands of him the sum of 450*l.*, which he owes to and unjustly detains from him. For that whereas the plaintiff on, &c., made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay the plaintiff the sum of 30*l.* four months after the date thereof, which period has now elapsed, and the defendant then accepted the said bill, and promised the plaintiff to pay the same according to the tenor and effect thereof, but the defendant did not pay the same when due. And whereas the plaintiff on the day and year last aforesaid, made one other bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to the plaintiff the sum of 20*l.*, four months after the date thereof, which period has now elapsed. And the defendant then accepted the said bill, and promised the plaintiff to pay the same according to the tenor and effect thereof, and of his said acceptance thereof, but the defendant did not pay the same when

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due. And whereas the defendant on, &c., was indebted to the plaintiff in 200*l.* for the price and value of goods then sold and delivered by the plaintiff to the defendant, at his request, and in 100*l.* for interest due and owing from the defendant to the plaintiff, for the forbearance of divers large sums of money due and owing from the defendant to the plaintiff, and by the plaintiff for a long space of time forborne to the defendant at his request; and in 100*l.* for money found to be due from the defendant to the plaintiff on an account then stated between them, which said several monies were to be respectively paid by the plaintiff to the defendant, on request, *whereby and by reason of the non-payment thereof, an action hath accrued to the plaintiff, to demand and have of and from the defendant, the said several monies respectively, amounting to the sum of 450*l.*, above demanded.* Yet, the defendant hath not paid the said sum above demanded, or any part thereof.

Special demurrer assigning for cause that there is a misjoinder of action in the declaration, part of the declaration being in an action of promises, and the remainder in an action of debt.

Thomas in support of the demurrer.—The declaration sets out the writ which is stated to be sued out in an action on promises, then follows two counts in *assumpsit*, and others in debt.—[*Parke, B.*—May not the words in the writ, “on promises, and he demands of him 450*l.*, which he owes to and unjustly detains from him,” be rejected as surplusage?—In *Dalton v. Smith (a)*, a count stated, that in consideration that the plaintiff, at the special instance and request of the defendant, had sold and delivered divers goods, &c., of him, the plaintiff, to the defendant, he, the defendant, undertook and faithfully promised to pay him so much, as the said goods, &c., were reasonably worth, when he, the defendant, should be thereunto afterwards requested. Averment, that they were reasonably worth 20*l.*, whereof the defendant had notice, whereby an action hath accrued to the plaintiff to have of and from the defendant, the said last mentioned sum of money, other parcel of the said sum of 100*l.* above demanded, and it was held, that this was not a good count in debt. So where a count stated, that the defendant was indebted to the plaintiff for work and labour, and that being indebted, he undertook and promised to pay, &c., whereby an action had accrued to the plaintiff; it was held, not to be a good count in debt, and could not be joined in the declaration with counts in debt, *Brill v. Neale (b)*.—[*Lord Abinger, C. B.*—In those cases, no breach was alleged; how is it less a debt, because the defendant has promised to pay it?—The two first counts do not contain the words “for value received,” without which, they are not good counts in debt.

Peacock, contra.—*Cloves v. Williams (c)*, is precisely in point. There the count stated, that the defendant accepted a bill and promised to pay the amount, whereby an action had accrued to the plaintiff to demand the amount, and it was held, to be a count in debt. As to the omission of the words “value received,” that objection can only apply to the two first counts, the demurrer therefore is too large.

(a) 2 Smith, 618.
 (b) 3 B. & Ald. 208.

(c) 3 Bing. N. C. 869

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PARKE, B.—*Cloves v. Williams* decides the point. It is true, that in the old forms of debt, upon a bill of exchange, the word "agreed," is made use of; but it appears to me, that there is no substantial distinction between "promised" and "agreed." As to the other objection, that can only apply to the two first counts, therefore the demurrer is too large.

Judgment for the plaintiff.

CHANTER v. LEASE and others.

The declaration stated, that by a memorandum of agreement between the plaintiff, of the one part, and the defendants, of the other (after reciting that by a certain other agreement between the plaintiff and the defendants, the plaintiff did agree with the defendants for the sale of *W.'s* patent furnace, and that plaintiff and one *C.* had obtained a patent for an improvement in generating steam, and the plaintiff and one *J.* a patent for a metallic wheel and revolving axle, and that the plaintiff was solely interested in a patent for a new mode of abstracting heat from steam vapour; and that the plaintiff and one *G.* had obtained a patent for an improved furnace;) it was agreed between the parties, that it should be lawful for the defendants exclusively to use, manufacture, sell, and dispose of any or all of the aforesaid patent inventions, upon this, among other considerations, that the defendants should pay to the plaintiff 400*l.* a year during the existence of the said agreement. *Breach*, non-payment. *Pleas*, as to the patent for the said supposed improvement in furnaces, that it was not a new invention, and that the supposed improvement in furnaces was not invented or found out by the plaintiff.

Held, on special demurrer, that as it did not appear by the declaration that the defendants ever enjoyed any part of the patents, which was the consideration for their agreeing to pay 400*l.* a year; or that that sum could in any way be apportioned among the different patents; that the plea impeaching the consideration, was good, to avoid the whole contract.

The memorandum of agreement was stated to be made between *J. C.*, *J. M.*, *J. I.*, and *J. G.* : *Held*, that there was a variance between the declaration and contract, in not setting out all the contracting parties.

Semble, That the contract being with all the parties, founded upon a consideration, to part of which each was a conducing party, the action ought to have been by all.

ASSUMPSIT. The first count of the declaration stated, that by a memorandum of an agreement, made the 25th day of February, 1836, between the plaintiff, of the one part, and the defendants, of the other part; after reciting that by a certain agreement bearing date the 6th day of September, 1833, between the plaintiff and defendant, *George Cussons*, the plaintiff did agree with the said defendant for the sale of *Witty's* patent furnace, in a certain district therein specified; and that the plaintiff had since obtained his Majesty's letters patent for an improvement in furnaces; and the plaintiff and *John McCurdy* had obtained a patent for an improvement in generating steam; and the plaintiff and *John Ingledew*, a patent for a metallic wheel, and revolving axle; and that the plaintiff was solely interested in a patent for a new mode of abstracting heat from steam, vapour, or other fluids; and that the plaintiffs and *John Gray* had obtained a patent for an improved furnace, applicable to locomotive engines. It was agreed between the said parties that for the considerations therein mentioned, it should be lawful for the defendants exclusively to use, manufacture, sell, and dispose of any, or all the aforesaid patent inventions, within the whole of the county of *Lancaster*, (except the town and parish of *Liverpool*, and a circuit of ten miles therefrom); and also within such part of the county of *Chester* as was within ten miles of *Manchester Exchange*, and not elsewhere, during the continuance of the said several letters patent respectively, subject to determination as thereafter mentioned, on certain terms (that is to say), that an office and warehouse, at *Manchester* aforesaid, for the sale and disposal of stoves, pipes, and all articles connected with the aforesaid patents, should be immediately prepared by the defendants, and that books of accounts of the sale of each of the said inventions should be kept by the defendants, and that such books should be open at all times, at such office in *Manchester*,

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for the inspection of the parties thereto, of the first part. That the defendants should pay to the plaintiff the sum of 400*l.* per annum, during the existence of the said agreement by half yearly payments, (stating the times) as a consideration for the aforesaid licence, for the sale, use, and manufacture of all the aforesaid patents, and for the power of granting licences to other persons for the same purpose, in the aforesaid district. And it was further agreed that the half yearly payments to the plaintiff should be charged as a payment, by the defendants in their books of account, and that the defendants should also pay to the said *John M^cCurdy* the sum of 5*s.* per horse power, for all boilers, or steam generators on Mr. *M^cCurdy's* patent principle, which should be used, manufactured, sold or erected, by them, being the said *John M^cCurdy's* proportion of the profit of the said patent boiler, or steam generator, calculating ten superficial feet of surface, per horse power, and on all boilers not applied to steam engines, the sum of five per cent., on the manufactures' charges for such boilers, and that such last mentioned payments, should be charged as such in the defendants' book of accounts; and the defendants should also, as a consideration for the aforesaid licence, pay to the plaintiff one moiety of the net profits, after the payments aforesaid, and all other payments, and to arise from *Witty's* patent furnace, and *Chanter's* improved furnace, and from *Chanter's* and *Witty's* patent, for extracting heat from vapour, and other fluids, and from *M^cCurdy's* boiler; and to the plaintiff and *John Ingledew*, two-thirds of such net profits to arise from the sale of *Ingledew's* patent wheel, and revolving axle; and to the said *John Chanter*, and *John Gray*, two-thirds of such net profits, to arise from *Chanter* and *Gray's* recent patent furnace, applicable to locomotive boilers. The agreement also contained a clause, enabling either of the parties, to put an end to it at the expiration of five, seven, or ten years, by giving to the other six months previous notice, in writing. The declaration then stated mutual promises. *Averment*, that afterwards, and during the existence of the agreement, to wit, &c., a large sum of money, to wit, the sum of 200*l.*, for and in respect of one half yearly payment of the said sum of 400*l.*, to be paid by the defendants to the plaintiff, for the half year ending on the day and year aforesaid, became due, and payable from the defendants to the plaintiff under and by virtue of the said agreement. *Breach*, non-payment of the 200*l.*, &c. There was also a count upon an account stated.

The second plea was as follows: And for a further plea to the first count of the declaration, the defendants say, the *letters patent for the said supposed improvement, in furnaces* in the first count mentioned, were and are letters patent, bearing date, &c., and which letters patent, being in the possession of the plaintiff, the defendants cannot produce the same to the Court here, whereby his said late Majesty, after reciting that the plaintiff had by his petition humbly represented unto his said Majesty, that after considerable application and expense, he had invented or found out an improvement in furnaces, which invention he believed would be of general benefit, and advantage, *that he was the true and first inventor thereof, and that the same had not been made or used by any other person, or persons, whomsoever, to his knowledge or belief*, wherefore the plaintiff humbly prayed, &c.; and his Majesty being willing, &c. Then followed the grant of the patent to the plaintiff, his executors, administrators, and assigns, to hold for fourteen years, from the date thereof. It then contained the following and other provisoes

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which were set out in the plea: Provided always, and those, his late Majesty's letters patent, were and should be, upon this condition, that if at any time during the said term, thereby granted, it should be made appear to his said Majesty, his heirs, &c., that his said Majesty's grant was contrary to law, or prejudicial, or inconvenient to his Majesty's subjects in general, or that the said invention was not a new invention as to the public use and exercise thereof, in that said part of his Majesty's United Kingdom, &c. (*England, Wales, Berwick-upon-Tweed,*) and also in all his Majesty's colonies and plantations abroad, or not invented, and found out by the plaintiff as aforesaid, then upon signification or declaration thereof, to be made by his said Majesty, his heirs, &c. those his Majesty's letters patent, should forthwith cease, determine, and be utterly void, &c. There was also a proviso, avoiding the patent, if the plaintiff should not particularly describe, and ascertain, the nature of the invention, and in what manner the same was to be performed, by an instrument in writing, under his hand, and seal, and cause the same to be enrolled in his Majesty's High Court of *Chancery*, within six calendar months, next, and immediately after the date of those letters patent. The plea then averred that the said supposed improvement in furnaces, in the said first count, and in the said letters patent mentioned, was not, at the time of the said petition, in the said letters patent mentioned, or of the said Royal Grant, a new invention as to the public use and exercise thereof, in that part of the United Kingdom of *Great Britain*, called *England*, contrary, &c., whereby the said letters patent, at the time of the granting thereof, were and are void and of none effect; all which the plaintiff, before and at the time of the making of the said memorandum of agreement, in said first count mentioned, well knew; and this the defendants are ready to verify, &c.

Thirdly. The defendants pleaded, that the supposed improvement in furnaces was not invented or found out by the plaintiff, as in the letters patent mentioned, contrary, &c. whereby the letters patent were void, all which the plaintiff, before making the memorandum of agreement in the first count mentioned, well knew. *Verification.*

To these pleas the plaintiff demurred specially; and the points he stated for argument were, that the pleas did not answer the whole of the matters in the first count; and that the matter therein contained, if true, constituted an answer to part only of the said first count, in this, to wit, that the promise of the defendants in the first count was made in consideration of the right and liberty to use and vend the whole of the patent inventions, in the said agreement, in the said first count mentioned, and set forth, whereas the defendants by their pleas, attempt to avoid the agreement, upon allegation of matter, which, if true, tends to invalidate one only of the said patents, and therefore to avoid only part of the consideration for the promise of the defendants in the first count mentioned; and also that they tendered an immaterial issue. The points for the defendant were, that the first count is bad, because it states an executory agreement only, and does not shew that the defendants enjoyed the licence therein mentioned, or any other ground for claiming the half yearly payment therein mentioned. The defendants in addition to the above special pleas, pleaded *non assumpsit*, and this issue was tried at the Spring Assizes for the county of *Lancaster*, 1838. At the trial, the plaintiff put in the agreement alluded to in the declaration, which was as follows:—Memorandum of

an agreement made the 25th day of *February*, 1836, between *John Chanter, John McCurdy, John Ingledew, and John Gray of the one part*; and *Joseph Juse, George Cussons, and James Diggles, machine makers and co-partners, of the other part*. The agreement then went on in the terms stated in the declaration, and also contained the following clauses, not set out therein. And it is hereby further agreed, that in order to bring the several patents into more general use in the aforesaid district, the said parties hereto, of the first part, do hereby agree to grant licences to any person or persons, within the district aforesaid, who shall be approved of by the said *Juse, Cussons, and Diggle*, to manufacture, sell, and use all or any of the said patent inventions; and that the proceeds of such sales and licences shall be disposed of by them according to the terms of this agreement: And it is hereby further agreed, that the said several allowances hereinbefore agreed to be made to the said parties, of the first part, are as compensation only for the use of their inventions, and that they are not to be construed to give to the said parties any share or interest in the working or manufacturing of such inventions, or any right or title to interfere therein; but that the said *Juse, Cussons and Diggle* are not to have the sole controul and management thereof, and are to indemnify and save harmless the said parties from all loss, costs, and expenses to be incurred by the said *Juse, Cussons, and Diggle*, in the working and manufacturing thereof. Signed by *Chanter, McCurdy, Ingledew, and Gray*.

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The defendant's counsel applied to the learned judge to nonsuit the plaintiff, on the ground that there were variances between the agreement proved and the setting it forth in the declaration, and also, that from the parties to, and terms of the agreement, the action ought to have been brought in the joint names of the plaintiff and the other parties to the agreement of the first part, and not in the name of the plaintiff alone. In order to obviate the former objection, the counsel, for the plaintiff, applied for an amendment, so as to make the declaration correspond with the agreement; but this, the learned judge declined to make, as there was a demurrer upon the record. He afterwards directed the jury to find specially under the 24th section of the 3 & 4 *Will.* 4, c. 42, that the agreement put in, was made with the defendants, in order that the plaintiff might apply to this Court for the amendment under that section. In last *Easter Term*, a rule was granted to shew cause why judgment should not be given for the plaintiff, under the above Statute, and the Court directed that the rule should come on for argument at the same time as the demurrer.

Cleasby for the plaintiff.—The pleas furnish no answer to the declaration, as they only apply to the patent for the improvement of furnaces, and leave the others untouched. There is no failure of consideration on the part of the plaintiff; from any thing that appears, the defendants have had the exclusive use, sale, and disposition of the patent inventions. There is no warranty in this case, and the principle of *caveat emptor* must apply. The pleas allege no fraud on the part of the plaintiff; and the fact of the improvements not being a new invention, or not invented at all by the plaintiff, is no answer to the action. The principle laid down in *Bowman v. Taylor* (a), is

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applicable, namely, that the newness of the invention, is not the question between the parties; *Hayne v. Mallby* (b), is not easily reconcileable with the former case. There the judges took different views of the subject; the judgments of Lord *Kenyon*, and *Ashhurst, J.*, proceeded chiefly on the ground of fraud, though none was pleaded; and *Buller, J.*, likened the case to that of landlord and tenant, and considered that the facts disclosed in the pleas, were equivalent to an eviction of the tenant. That case, however, is distinguishable from the present, and it is enough to say, that it was disapproved of in *Bowman v. Taylor*. *Hare v. Taylor* (c) is more like the present case. There the party was not allowed to recover back what he had paid for the use of the patent, as it did not appear that he had not received the fruits of his agreement. So here the pleas only touch the question of right, and not of enjoyment. Admitting that the allegations, that this was a new invention, and that the plaintiff was the inventor, are wrong, still, that forms no answer to the action, but can only be considered, if at all, in mitigation of damages. This is a grant of licence to use six patent inventions, and as nothing is said about five of them, it must be assumed, that the defendants have had the enjoyment of those. The failure of consideration, as to part, is no bar to the action. "Where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant, without averring performance in the declaration (d);" *Boone v. Eyre* (e); *Campbell v. Jones* (f); *Ritchie v. Atkinson* (g). It does not appear what is the relative value of the several patents, and the defendants may have sustained some damage by being deprived of the enjoyment of one of them. The correct principle is laid down by Lord *Ellenborough*, in *Ritchie v. Atkinson*, and the same rule applies to agreements as to covenants, *Bommam v. Tooke* (h); *Havelock v. Geddes* (i); *Allen v. Cameron* (j), shews, that where there is an agreement to do an act, and part of the consideration has failed, that affords no answer to an action for the non-performance, but is to be taken into account in estimating the damage. If it were otherwise, there would be an end of the whole agreement.—[Lord *Abinger, C. B.*—This is the old question, whether the performance is the consideration, or the promise is the consideration.]—The distinction is adverted to by *Taunton, J.*, in *Rose v. Poulton* (k). Here there is a further question, whether the action is properly brought by the plaintiff alone. That will appear both from the declaration and the agreement. The declaration contains some stipulations applicable to the plaintiff only, and some promises, of which the plaintiff alone is to have the benefit; as therefore, the whole consideration moves from him, he *must* sue alone for the breach of them. It is said in 1 *Will. Saund.* 153, n. 1, that where a covenant or agreement is joint, but the benefit is to one, the covenant shall be taken to be several, and each *may* bring a separate action. Subsequent cases have decided, that each *must* do so, *Brand*

(b) 3 T. R. 438.

(c) N. R. 260.

(d) 1 Saund. 320, b. n. 3.

(e) 2 W. Black. 1312.

(f) 6 T. R. 570.

(g) 10 East, 295.

(h) 1 Camp. 377.

(i) 10 East, 555.

(j) 1 C. & M. 832.

(k) 2 B. & Adol. 831.

v. Boulcott (l); *Withers v. Bircham (m)*.—[*Alderson, B.*, referred to *Servants v. James (n)*.]—As to the variances, it does not affect the merits of the case; the Court will, therefore, give judgment for the plaintiff, according to the very right under the 24th section of the 3 & 4 *Will. 4*, c. 42.

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Cowling, contra.—The declaration is bad, for only stating an agreement, without shewing that defendants have had the benefit of it. The plaintiff seeks to recover the sum of 200*l.*, which he is only entitled to upon shewing that the defendants have enjoyed these patent rights. The declaration should then have averred that fact, and it is the more necessary, as this agreement not being under seal, might be revoked at any time. If an action were brought for the infringement of the patent, the defendants could not plead this agreement as a bar to it. *Bowman v. Taylor*, and *Hayne v. Maltby*, shews that a right of this sort can only be conveyed under seal, and there must be a distinct averment of enjoyment. It has been assumed upon the other side, that the defendants have enjoyed the five other patents, but there is no reason for such supposition. This difficulty is attempted to be got over by relying on the words, that “during the existence of the agreement,” the money became due; but, that averment means no more than that no notice had been given to terminate it. If indeed, the defendant had enjoyed these rights, it might have been likened to the case of estoppel. In *Bird v. Higginson (o)*, similar points arose. There one objection was, that the agreement was for the grant of an incorporeal hereditament, and ought, therefore, to have been under seal; and Lord *Denman, C. J.*, says “We are clearly of that opinion. We wished, however, to consider whether the plaintiff might not be entitled to recover for the actual enjoyment of the thing demised. On examining it more accurately, we find that the count is not so framed, for it only alleges that the defendant entered and became possessed for the term, which he might do without a single hour’s occupation of the premises.”

Secondly, as to the plea, *Haynes v. Maltby* is a distinct authority for the defendant; and the language of *Buller, J.*, applies here. He says, “I think that the case of landlord and tenant, is not unlike this; for the facts in this case disclosed by the pleas, are equivalent to an eviction of the tenant. As long as the tenant holds under the lease, he is estopped from denying his landlord’s title; but when he is evicted, he has a right to show that he does not enjoy that which was the consideration for his covenant to pay the rent.” That case was said to be doubted in *Bowman v. Taylor*, but the Court held it clearly distinguishable. *Taylor v. Hare* has hardly any bearing upon the question; because, there it appeared that the defendant had actually enjoyed the privilege. It has been suggested, that a promise to pay may arise from the mere agreement; but it is submitted, that it cannot, unless an enjoyment of the licence is shewn. It is not denied, that if there be several considerations leading to the promise, and one, or more of them, fail, the plaintiff may recover; but the objection in the present case, is not that part of the consideration failed, but that part of it was absolutely false within the knowledge of the plaintiff. In *Com. Dig. Action on the Case, Assumpsit* (154, B.

(l) 3 B. & P. 235.
(m) 3 B. & C. 254.

(n) 10 B. & C. 410.
(o) 2 A. & E. 696.

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13,) it is stated, that "if one of the considerations is found false by the jury, the action fails;" and again, "If one of the considerations is unlawful, that vitiates the whole, and the plaintiff shall recover for nothing." If it had been averred, that the defendants had enjoyed these patent rights, the plea might have been bad. In all the cases cited from *Saunders*, there was an enjoyment.

Thirdly, as to the variance. The proper parties are not the plaintiffs. An action on a contract must be brought in the name of the party who has the legal interest, *Chitty on Pleading*, p. 2. If a party agree with *A.* and *B.* to pay *C.* money, the legal interest vests in *A.* and *B.*, *Anderson v. Martindale* (*p.*). If land be conveyed, a moiety to *A.*, and a moiety to *B.*, they must bring separate actions. In order to see who has the legal estate, the whole instrument must be looked to. The agreement is with the plaintiff and several other persons, though in some cases, the benefit may accrue to the plaintiff alone. The consideration is a licence, which all join in giving to the defendants. The case shews, that under these circumstances, all should join in the action, 2 *Saund.* 116, n. 2, *Hatsall v. Griffith* (*q.*). It may be different where the party has an interest in land or annuities; there the covenant will attach to the estate, as in *Withers v. Bircham*, and *Cervante v. Jones*, and the covenantees may sue separately.

Cleasby, in reply.—*Hatsall v. Griffith*, was the case of an employment, by the defendant, of two persons to sell a ship, for the benefit of three who had no separate interests. Here it appears what the interest of each is; *James v. Emery* (*r.*), is a clear authority in favour of the plaintiff; *secondly*, the contract must be taken to have been executed by the plaintiff; if he had anything to perform, it is for the defendants to shew it.—[*Lord Abinger*, C. B.—Here it does not appear whether the defendants enjoyed or not; in all the cases cited, there was an averment of enjoyment.]—The licence is good, though not under seal. It is stated in *Com. Dig.* Action on the Case, *Assumpsit* (B. 6), that permission is a good consideration to support an *assumpsit*.

Cur. adv. vult.

Lord ABINGER, C. B., now delivered judgment.—We think the judgment ought to be for the defendants, on the demurrer. The declaration is founded upon the contract, and nothing but the contract. If a man contract to pay a sum of money, in consideration that another has contracted to do certain things on his part, and it should turn out before anything is done under it, that the latter is incapable of doing what he engaged to do, the contract is at an end. The party contracting to pay the money, is under no obligation to pay for a less consideration, than that for which he has stipulated. If indeed, he does accept of a partial performance, and to a certain extent, enjoys the benefit of that for which he stipulated, it may become a question, whether he may not be liable upon an implied contract to pay for what he has had; or where the consideration is, in its nature, capable of being divided, and the payment apportioned by the terms of the contract, there may still be a

(*p.*) 1 East, 497.
 (*q.*) 2 C. & M. 679.

(*r.*) 8 Taunt. 246.

right to recover the portion due upon the original contract. So, where a party takes an estate under a conveyance, with a warranty of title in the vendor, he cannot afterwards object to paying the consideration, on the account of the want of a good title to a part of the estate, but must resort to his action on the warranty. This was the case of *Boon v. Eyre*, cited in the argument. But in the present case, it does not appear to the Court that the defendants ever accepted, or enjoyed, any part of the patents, which were the consideration of his agreeing to pay 400*l.* a year to the plaintiff, nor that the sum he so agreed to pay, can in any manner be apportioned amongst the different patents which he might have had, the possession of all and each being an entire consideration. The plea therefore, impeaching that consideration, is a good plea to avoid the whole contract, as it appears on the record.

With respect to the proceedings on the plea, we are rather inclined to think that this contract, being with all of the parties, founded upon a consideration, to part of which each was a conducing party, the action ought to have been by all, upon the promise made to all, though only one was to receive the money; but it is not necessary to give any judgment on this point, because we think there was a variance between the declaration and contract, in not setting out all the contracting parties, and that the plaintiff therefore, ought to have been nonsuited.

Judgment for the defendant on the demurrer,
and rule absolute to enter a nonsuit.

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DEBT. The declaration stated, that heretofore, to wit, on the 17th *October*, 1837, in and by a certain indenture, then made between the plaintiff, of the first part; *W. Brookes*, of the second part; and *R. Hollis* and the defendant, of the third part (*profert*), certain land and premises were granted, bargained, sold, alienated, enfeoffed, and confirmed unto the said *R. Hollis* and the defendant, their heirs and assigns; to hold the same unto the said *R. Hollis* and the defendant, and their heirs, to the use, intent, and purpose that the plaintiff, his heirs and assigns for ever, should and might, out of the said land and the dwelling-houses, and other buildings erected thereupon, with the appurtenances, receive and take one clear yearly rent or sum of 63*l.*, of lawful money of *Great Britain*, to be payable half-yearly, free from all deductions whatsoever; and to the further uses, intents, and purposes in the said indenture mentioned; and the said defendant did by the said indenture, for himself, and for his heirs, executors, administrators, and assigns, covenant, promise, and agree with and to the plaintiff, his heirs and assigns, that they the said *R. Hollis* and the defendant, their heirs, executors, administrators, and assigns, or some or one of them, should or would for ever thereafter well and truly pay, or cause to be paid unto the plaintiff, his heirs and assigns, the said yearly rent of 63*l.*, by the said indenture limited in use to him and them, on the days and times thereinbefore appointed for payment thereof, and thereinbefore mentioned, without any deduction or abatement whatsoever; and

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the plaintiff saith, that after the making of the said indenture, to wit, on the 25th March, 1838, which day elapsed before the commencement of this suit, a large sum of the yearly sum or rent aforesaid, to wit, 31*l.* 10*s.*, became due to the plaintiff, according to the said covenant, for one half of a year, ending on the day and year last aforesaid, and then last elapsed. And the plaintiff further saith, that the said *R. Hollis* was then, and thence to the commencement of this suit, alive. Breach, that neither *R. Hollis* nor the defendant paid the said sum, but therein made default, contrary to the said covenant, whereby an action hath accrued to demand the said sum of 31*l.* 10*s.*

General demurrer and joinder.

Wightman, in support of the demurrer.—Debt will not lie for the arrears of an annuity issuing out of land, *Kelly v. Chubbe* (a). The point was more fully considered in *Webb v. Jiggs* (b); there it was decided that debt would not lie at common law, nor by Stat. 8 Ann, c. 14, for the arrears of an annuity or yearly rent, devised, payable out of lands to A., during the life of B., to whom the lands were devised for life, so long as the estate of freehold continued. It is true there is a distinction between that case and the present, because there the annuity was created by devise; here it arises by grant, and there is a covenant to secure its payment; but the same principle will apply to both cases. Covenant is a collateral security; but the annuity issues out of the land. The defendant may possibly be liable in covenant, but not in the present form of action, the covenant being merely collateral.

Crompton, contra.—It may be conceded that this is a collateral covenant, but it is also a covenant to pay a sum in gross, in which case either debt or covenant may be maintained, *Ingledeu v. Cripps* (c).—[*Parke, B.*—It is laid down that debt will not lie upon a conditional covenant; that if C. do not pay B. 10*l.*, then A. will pay it, *Wentworth's Office of Executors.*]—*Webb v. Jiggs* arose upon a devise; and the Court proceeded upon the ground of want of privity.—[*Parke, B.*—The Court decided that case upon the ground that, during the continuance of the freehold an action would not lie; but the only remedy was a real remedy.]—It is not contended that debt will lie where there is a mere taking of profits; but here there is a collateral covenant in gross, which would not go with the land, or pass with the debt. In *Kelly v. Chubbe*, it must be assumed that there was no covenant. This case resembles *Milnes v. Branch* (d); there J. B. being seised in fee, conveyed to defendant and T. J., their heirs and assigns, to the use that J. B., his heirs and assigns, might have and take to his use a rent certain, to be issuing out of the premises, and subject to the said rent, to the use of defendant, his heirs and assigns; and defendant covenanted with J. B., his heirs and assigns, to pay to him, his heirs and assigns, the said rent, and to build within one year, one or more messuages on the premises, for better securing the said rent; and J. B. within one year demised the said rent to plaintiffs for 1000 years; and it was held that covenant would not lie for the plaintiffs for non-payment of the rent, or for not building the messuages, for the covenant was personal to J. B.

(a) 3 B. & B. 130.
 (b) 4 M. & Sel. 113.

(c) 2 Ld. Raym. 814.
 (d) 5 M. & Sel. 411.

Cooke v. Herle (e), shews that this covenant could not be transferred.—[*Parke, B.*—How do you distinguish this from the case of a lease, with a covenant by the lessee, his executors, administrators, and assigns, to pay the rent: the lessee assigns, and the assignee enters, and is accepted as tenant by the lessor. In case of non-payment of the rent, the lessor may maintain debt against the assignee, but can only bring covenant against the lessee, because the privity of the estate is determined, *Mills v. Auriol* (f).]—Those are questions as to how far debt will lie upon a contract arising from the privity of estates; here the covenant, in its inception, is the same as if it were between *A. B.* and *C. D.* to pay a certain sum. The case is also distinguishable from the cases of guarantee and indemnity, because they sound in damages.

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Wightman, in reply.—There is no doubt this is a covenant in gross, but it is also a covenant collateral, and in that case there is no such duty between the defendant and plaintiff as will enable the latter to maintain debt. *Coke v. Herle* is an express authority that this is a collateral covenant. The primary duty is not that the defendant shall pay it: in the first instance it is to be taken out of the land; if it be not paid from the land, then the defendant is looked to. This then sounds in damages, and covenant is the only remedy.

LORD ABINGER, C. B.—The question is not whether the defendant is liable, but whether he is liable in this form of action. It is an action on a collateral covenant, by which the defendant and another undertake to pay an annuity, secured on land. The case, then, resembles that of a lessee who has assigned his lease: and in *Mills v. Auriol* the effect of such assignment was considered. There *Wilson, J.*, says, “An action of covenant remains after the estate is gone; but, generally speaking, when the land is gone, the action of debt is also gone, debt being maintainable because the land is debtor. Covenant is founded on a privity, collateral to the land.” Here the relation of the defendant to the plaintiff is the same as that of the original lessee to the lessor, after the assignment of the estate.

PARKE, B.—I am of the same opinion. No doubt this is a collateral covenant in gross, as it does not run with the land; for that *Milnes v. Branch* is an authority. It is also collateral, in the sense insisted upon by *Mr. Wightman*: as it is not a covenant to perform any direct duty accruing from the defendant to the plaintiff, but to pay an annuity secured on land. The cases shew, that under such circumstances debt cannot be maintained. This case ranges itself within the principle of *Mills v. Auriol*, which has been referred to, and covenant is the only remedy.

BOLLAND and ALDERSON, Bs., concurred.

Judgment for the defendant.

(e) 2 Mod. 138.

(f) 1 H. Black. 433; 4 T. R. 94.

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JORDAN v. NORTON.

Upon a treaty for the purchase of a mare, the defendant wrote to the plaintiff, "I will take the mare at twenty guineas, of course warranted." And he again wrote, "my son will be at the *World's End* on Monday, when he will take the mare and pay you; if you want to go elsewhere, send any body with a receipt, and the money shall be paid; only say in the receipt, *sound, and quiet in harness*." The plaintiff in answer wrote, "she is warranted sound, and quiet in double harness; I never put her in single harness, as I never wanted it." The mare was sent to the *World's End*, but the plaintiff's servant not finding the defendant's son, left the mare in the care of the landlord. Afterwards the defendant's son came, and took the mare home, where she was kept a few days, and then returned as unsound.—*Heid, First*, that there was no evidence of a complete contact in writing. *Secondly*, that there was no acceptance upon the terms of the limited warranty, as the defendant was not bound

ASSUMPSIT for the price of a mare sold and delivered, with a count on an account stated. *Plea, non-assumpsit.*

At the trial, before Gurney, B., at the Oxford Spring Assizes, 1838: it appeared that the plaintiff and defendant lived about thirty miles from one another, and in October, 1837, at the request of the defendant, the mare in question was sent to a public house, called "*The World's End*," situated about half way between their houses, for trial by the defendant, whose son, in his presence, rode the mare, and defendant then offered twenty guineas for her, which the plaintiff's servant refused, having directions from the plaintiff not to take less than 22*l.*; and he took away the mare. Subsequently, however, the plaintiff agreed to let defendant have her for twenty guineas, and wrote to him to that effect. Defendant wrote in answer.

"Sir,

Uxbridge, October 17th, 1837.

I will take the mare at the twenty guineas, of course warranted; but as you say you will have another horse, that I shall buy, the same expense will bring the two up; therefore, as the mare lays out, turn her out, my mare, and I will meet you at *West Wycombe, Saturday or Monday*, which day you like, and pay you at once."

The mare was sent accordingly, but defendant was not there. Two appointments were subsequently made, one at the *World's End*, and another at *Wycombe*, but not kept by defendant, who, in reply to a letter from the plaintiff, wrote,

"Sir,

Uxbridge, October 26th, 1837.

Of course I mean to have the mare; and if you had read my note properly it would have saved you a great deal of trouble. I now say, my son will be at the *World's End* on Monday, the 30th instant, when he will take the mare, and pay you. If you want to go elsewhere, send any body with a receipt and the money shall be paid; only say in the receipt, *sound and quiet in harness*."

In answer, the plaintiff, on the 27th of October, wrote to say, he would send the mare and receipt at the time appointed, stating, "she is warranted sound, and quiet in double harness; I never put her in single harness, as I never wanted it." On the 30th, the mare was sent to the *World's End*, but the plaintiff's servant who took her there, not finding the defendant's son, returned home, and left the mare in the care of the landlord; with directions not to give her up to the defendant without payment. After his departure, the defendant's son came, and took away the mare without paying for her, riding her home, a distance of eighteen miles, to the defendant's stables, where she remained two days. The son, when called for the defendant, said her legs were swollen; that his father, on sending him to the *World's End*, had told him not to bring away the mare without the warranty, and was angry by the act of his son, in bringing the mare home, under the circumstances.

with him on his return for having done so. The mare was sent back for unsoundness, but the plaintiff refused to receive her, and she was put out of the yard; and it did not appear what had become of her. The witness who took her back, as well as the son, said the mare was not sound. This evidence was objected to, but afterwards admitted in mitigation of the damages. The learned judge told the jury, that the plaintiff was bound to prove a delivery of the mare; but that there could be no delivery without an acceptance upon the part of the defendant. That the defendant required two things, a receipt, and a warranty inserted in it. That the plaintiff had given neither; and therefore the question was, had the defendant waived them by accepting the mare, which would depend on whether or not he had returned her within a reasonable time. If they thought he had returned her within a reasonable time, to find a verdict for the defendant; if not, for the plaintiff. They would also say, whether the defendant's son had authority to take away the mare without a warranty. The jury found, that the defendant had not accepted the mare, and that the defendant's son, had not authority to take away the mare. The learned judge directed a verdict for the defendant, giving leave to the plaintiff to move to enter a verdict, if the Court should think both the direction and admission of evidence of unsoundness wrong.

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Talfourd, Serjt., having obtained a rule accordingly,

Ludlow, Serjt., shewed cause.—As the defendant's son acted without authority, the defendant is not bound by this act. The plaintiff ought to have sent a receipt and warranty, as it was upon those terms alone that the defendant consented to purchase the mare.—[*Parke*, B.—The letter of the 26th requires a warranty, of "sound, and quiet in harness;" but the plaintiff, in his answer, only gives a warranty of soundness, and quiet in *double* harness.]—Under these circumstances, the defendant was not bound to accept the mare; and having sent her back within a reasonable time, he must be considered as having repudiated the contract.

Talfourd, Serjt., and *Keating*, in support of the rule.—There was a complete delivery of the mare at the *World's End*, and an acceptance of her by the son, who was the agent of the vendor for all purposes. The giving a receipt was not a condition precedent on the part of the plaintiff, but was only to be given on payment of the money. It was a misdirection on the part of the learned judge, to ask if the defendant had accepted, as there was a complete binding contract. Before the letter of the 17th *October*, the son had ridden the mare, and the defendant offered twenty guineas for her, which was refused. Then comes the letter of the defendant, upon the terms of which there was a complete contract, subject to a warranty. The warranty, then required, imported soundness only; but the defendant afterwards introduces a new term as to the warranty, to which the plaintiff never assented. But even assuming that the contract remained open, the acts of the defendant were sufficient to fix him with an implicit promise; and it was a misdirection to ask the jury if the mare had been kept beyond a reasonable time. The son rode the mare twenty miles, the defendant kept her two or three days,

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and then she was returned, with her legs swollen. *Street v. Blay* (a), establishes this proposition, that if a party purchase a specific chattel, and having had an opportunity of exercising his judgment upon it, receives it into his possession, he cannot afterwards rescind the contract, on the ground that the warranty has not been complied with.

PARKE, B.—I am of opinion that this rule must be discharged. The first question is, whether there was any evidence of a complete contract in writing; because if there was, the only necessary step to enable the plaintiff to recover would be, to prove a delivery of the mare at the place assigned. Now the mare had been seen and ridden, and twenty guineas offered for her, prior to the 17th *October*; but the plaintiff would not agree to the terms. The letter of the 17th *October* is written, containing a proposal to purchase the mare, and give twenty guineas for her, provided she is warranted. As to the terms of the warranty, they are not mentioned, but remained to be agreed upon, and if not agreed upon, there was no complete contract. Then comes the letter of the 26th *October*, by which he agrees to be bound by the contract, provided the plaintiff will give a warranty of a particular description, namely, that the mare is quiet in harness, which means, harness of all kinds. The plaintiff answers that letter, by giving a warranty as to double harness only, there is no warranty as to single harness. Then as to the conduct of the parties; does the acceptance by the defendant's son, at the *World's End*, amount to an acceptance, upon the limited terms of warranted sound in double harness. It is contended that the defendant is bound by all his son does; but that is not so, the son had only a limited authority. There is no hardship on the plaintiff, because he was distinctly informed that the son was to pay for the mare, provided she was warranted sound, and quiet in harness. Therefore the son could not bind the defendant by a new implied contract. The remaining question is, whether the defendant has accepted the mare upon the new terms; that has been left to the jury, and they have found that there never was a complete binding contract.

BOLLAND, B.—I am of the same opinion. It is said that after the son took the mare home, she was kept so long as to amount to an acquiescence upon the part of the defendant. That argument may be better applied to a specific chattel, and where the party has had an opportunity of exercising his judgment upon it. Here, the plaintiff never gave a warranty as to all harness, which was the one required, but only as to double harness.

ALDERSON, B.—If the son was authorized to receive the mare upon the limited terms, as if the father had accepted the delivery, the contract would have been complete; but the son had no authority to contract, and the defendant repudiates the acceptance on the part of his son.

: GURNEY, B., concurred.

Rule discharged.

RHODES v. SMETHURST, Administrator, &c.

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ASSUMPSIT. The first count of the declaration stated, that one *James Hobson*, in his life time, and before the commencement of this suit, to wit, on the 13th day of *May*, 1818, made his promissory note in writing, and thereby promised to pay to the plaintiff or his order, on demand, 2,500*l.*, together with lawful interest for the same, from the date thereof until paid, for value received of him. And the said *James Hobson* then delivered the said note to the plaintiff, and then, in consideration of the premises, promised the plaintiff to pay the same according to the tenor and effect thereof; yet the said *James Hobson*, in his life time, and the defendant, administrator as aforesaid, since his death have disregarded the said promise of the said *James Hobson*, and have not, nor hath either of them, paid the said sum of money in the said promissory note specified, or the interest for the same, but, on the contrary thereof, there were at the time of the commencement of this suit, and still are, due and owing to the said plaintiff, the said principal sum of 2,500*l.*, in the said promissory note specified, and a large sum of money, to wit, the sum of 712*l.* 8*s.* as and for lawful interest for the same, contrary to the tenor and effect of the said note. The declaration contained other counts which are not material. The third plea was, "And for a further plea to the first four counts of the said declaration, the defendant administrator as aforesaid, says, that the said several supposed causes of action in the said first four counts mentioned, did not, nor did any or either of them, or any part thereof, accrue to the plaintiff at any time within six years next before the commencement of this suit, in the manner and form, as the plaintiff has above thereof in those said counts complained; and this the defendant is ready to verify," &c.

Replication. And as to the said third plea of the defendant, so far as the same relates to the said first count of the said declaration, the plaintiff saith, that the said causes of action in that count mentioned accrued to the plaintiff within six years next before the time of the death of the said *James Hobson*, to wit, on the first day of *May*, 1829; and that afterwards, to wit, on the 13th day of *May* 1830, the said *James Hobson* died, having heretofore to wit, on the 8th day of *February*, 1817, signed a certain testamentary paper purporting to be the last will and testament of him the said *James Hobson*, and thereby then named and appointed the plaintiff and *Betty Hobson*, which said *Betty Hobson* died in the lifetime of the said *James Hobson*, executor and executrix thereof, and having afterwards in his lifetime, to wit, on the 11th day of *December*, 1829, signed a certain other testamentary paper, also purporting to be the last will and testament of him the said *James Hobson*, wherein no person was named as executor thereof. And the plaintiff further saith, that shortly after the death of the said *James Hobson*, and before the grant of administration of the goods and chattels, rights, and hereditaments of the said *James Hobson* deceased, at the time of his death, to the defendant or any other person, to wit, on the 1st day of *October*, 1830, the plaintiff applied to the proper ecclesiastical Court, (that is to say) the Consistory Court

The plaintiff having a cause of action against *B.* in *May*, 1829, the latter died in 1830, no action having been commenced against him. Some litigation took place respecting his will, and in *June*, 1835, administration of the effects of the deceased was granted to the defendant, and in *September*, 1835, the plaintiff commenced his action:—*Held*, that the debt was barred by the Statute of Limitations, and that the plaintiff was not entitled to deduct from the six years the time between the death of *B.* and the grant of administration to the defendant.

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of *Chester*, that probate of the said testamentary paper hereinbefore firstly mentioned as the last will and testament of the said *James Hobson*, deceased, might be granted to him the plaintiff, as the executor thereof therein named; whereupon, to wit, on the day and year last aforesaid, the defendant then claiming to be next of kin to the said *James Hobson*, deceased, produced to the said last-mentioned Court the said testamentary paper hereinbefore secondly mentioned, and then required of the said last-mentioned Court, that administration of all and singular the goods, chattels, and credits of the said *James Hobson*, deceased, at the time of his death, with the said last-mentioned testamentary paper, annexed as the last will and testament of the said *James Hobson*, deceased, should be then granted to her the defendant, as such next of kin of the said *James Hobson*, deceased, as aforesaid; and thereupon it being the opinion of the said last-mentioned Court, that the plaintiff was entitled to probate of the said testamentary paper hereinbefore firstly mentioned, as the last will and testament of the said *James Hobson*, deceased, it was afterwards, to wit, on the 22d day of *November*, 1832, by the reverend and worshipful *Henry Raikes*, clerk, master of arts, vicar-general and official principal of the right rev. Father in God, *John Bird*, by divine providence lord bishop of *Chester*, decreed that probate of the said testamentary paper, hereinbefore firstly mentioned, as the last will and testament of the said *James Hobson*, deceased, should be granted to the plaintiff, whereupon the defendant then appealed against the said decree to the Chancery Court of *York*, and such proceedings were therefore had, that afterwards, to wit, on the 26th of *July*, A. D. 1833, the said decree of the said Consistory Court of *Chester* was, by the right worshipful *Granville Harcourt Vernon*, M. A., official principal of the said Chancery Court of *York*, reversed, annulled, and rescinded, and the defendant was then, by the said *Granville Harcourt Vernon*, as such official principal of the said last-mentioned Court, declared to be entitled, as the next of kin of the said *James Hobson*, deceased, to the administration of all and singular the goods and chattels, rights, and credits of the said *James Hobson*, deceased, at the time of his death, with the said testamentary paper hereinbefore secondly mentioned, as the last will and testament of the said *James Hobson*, deceased; whereupon the plaintiff then, to wit, on the day and year last aforesaid, appealed against the said last-mentioned decree, to the most noble and right honourable the Judicial Committee of the Privy Council of his late Majesty king *William* the Fourth, and such proceedings were thereupon had, that afterwards, to wit, on the 2d of *February*, 1835, by a certain report then made to his said late Majesty in and by the said judicial committee, it was then reported and recommended that the said decree of the said Chancery Court of *York* should be affirmed; and that administration of all and singular the goods, chattels, rights, and credits, which were of the said *James Hobson*, deceased, at the time of his death, with the said testamentary paper hereinbefore secondly mentioned as the last will and testament of the said *James Hobson*, should be granted to the defendant; which said report was afterwards, to wit, on the 18th of the said month of *February*, by his late Majesty in Council, duly affirmed; in pursuance whereof, afterwards and not at any earlier period, to wit, on the 18th of *June*, 1835, administration of all and singular the goods, chattels, rights, and credits, which were of the said *James Hobson*, deceased, at the time of his death, with the said last will and testament of the said

James Hobson, deceased, annexed, was duly granted to the defendant; and the plaintiff in fact, further saith, that until the said grant of administration so made to the defendant as aforesaid, there was not at any time, from the time of the death of the said *James Hobson*, any legal personal representative of the said *James Hobson*, deceased, or any other person whomsoever, liable to the plaintiff, and against whom the plaintiff could commence any action or suit in respect of the said causes of action, in the said first count mentioned; and that within a reasonable time, (that is to say), within the space of three months after the said grant of administration to the said defendant as aforesaid, to wit, on the 12th of *September*, 1835, the plaintiff issued his writ of summons out of the said Court here, and thereby commenced his said action against the defendant as such administratrix as aforesaid, in respect of the said sums of money and causes of action in the said first count of the said declaration mentioned; and the plaintiff, in fact, says, that the said period which respectively elapsed between the accruing of the said causes of action in the said first count mentioned, as hereinbefore mentioned, and the time of the death of the said *James Hobson*, and between the said grant of administration to the defendant as aforesaid and the time of the commencement of this suit, do not together amount to the period of six years, but only to a much less time, to wit, to the period of one year and four months, and this the plaintiff is ready to verify.

Rejoinder. And the defendant, as to the said replication of the said plaintiff to the said third plea of the said defendant, so far as relates to the first count of the said declaration, says, that the said causes of action, in that count mentioned, did not accrue to the plaintiff within six years next before the time of the death of the said *James Hobson*, in manner and form as the plaintiff has above, in his said replication in that plea, so far as relates to the said first count, alleged.

At the trial a verdict was found for the plaintiff upon all the counts of the declaration. A rule having been obtained to arrest the judgment upon the first count,

Sir *W. W. Follett* shewed cause.—It is clear upon this record that though six years have passed since the cause of action accrued, yet that six years have not elapsed during which the plaintiff might have sued, but only one year and four months. The 21 *Jac.* 1, c. 16, s. 3, provides “that all actions upon the case (other than slander) shall be commenced and sued within six years next after the cause of such actions, and not after. The question then is, whether there are to be six years, during all which the party could commence his action, or whether a lapse of six years is to be a bar, whether the party had the power of suing or not. It is admitted that where a cause of action has accrued to a testator, his executor will stand in the same situation and be affected by the Statute, *Hickman v. Walker* (a). As in the case of a *formedon in descender*, the 20 years will begin to run when the title descends to the first heir in tail, *Tolson v. Kaye* (b). This Act of Parliament has, in many instances, received a liberal construction. Under the third and seventh sections two questions have arisen, and both have been decided against the latter, and according to the spirit of the Act. Thus, in section 3, actions on the

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(a) *Willis*, 27.

(b) 3 B. & B. 217; 6 Moore, 542.

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case are specially mentioned; but in section 7, actions on the case, except for words, are specially excluded. So upon section 7, supposing the party to be an infant at the time the six years expired, it was objected that he could not then bring his action, but must wait until after he was of full age. Both these cases were decided in favour of the intention of the legislature, and against the letter of the Act, *Chandler v. Vilett* (c), *Crosier v. Tomlinson* (d). The action of *trover* has also been decided to be within the third section, though omitted in the enumeration of the actions in the subsequent part of it, *Swayn v. Stephens* (e). Again, in *Matthews v. Phillips* (f), the words of the Act were departed from. That case decided, that if an action be commenced in an inferior Court, and then removed by *habeas corpus* into the *King's Bench*, where the plaintiff declares *de novo*, and the defendant pleads the Statute, the plaintiff may reply the suit below, and shew that to have commenced within six years of the cause of action. If there has been no laches or default, the Statute will not apply. *Wilcocks v. Huggins* (g), shews, that if an executor takes out proper process within a year after the death of the testator, if the six years be not lapsed before the death of the testator, though they be lapsed within the year, yet it will be sufficient to take the case out of the Statute. Similar cases will be found in *Com. Dig.*, tit. "*Temps.*" *Middleton v. Forbes*, in a note to *Karver v. James* (h).

But, *secondly*, the Statute will not run where the plaintiff is unable to proceed for want of a person whom he can sue. Formerly the exception in the 7th section as to persons beyond the seas, was held to extend to plaintiffs only and not to defendants, *Hall v. Wybourn* (i); but now, by 4 *Ann*, c. 16, s. 19, if any person, *against* whom there is any cause of action, for seaman's wages, or of action upon the case, shall be, at the time of such cause of action accrued, beyond the seas, the person entitled to the action may bring the same against such person *after* his return from beyond the seas, within the time limited by the 21 *Jac.* 1, c. 16. The Statute will not run if there be no executor, until administration be taken out, *Joliffe v. Pitt* (j). The rule, that when the Statute has once began to run, it does not stop, only applies to cases where the plaintiff might have proceeded with his actions, but is inapplicable where the law prevents him. It appears from the case of *Curry v. Stephenson* (k) that where money is received after the death of the intestate, and no administration is taken out until more than six years afterwards, the time of limitation must be computed from the day on which the letters of administration were granted. It is true, that in that case the cause of action accrued after the death of the intestate, but still the same principle applies here. So where an action was brought by an administrator upon a bill of exchange, payable to the intestate, but accepted after his death, it was expressly decided that the Statute of Limitations began to run from the time of granting the letters of administration, and not from the time the bills became due, there being no cause of action until there is a party capable of suing, *Murray v. East India Company* (l). Those were cases in which the plaintiff, at a subsequent period, was first clothed with the right of suing; but

(c) 2 Saund. 120.
 (d) 2 Mod. 71; Fitz. 81.
 (e) Cro. Car. 245.
 (f) 2 Salk. 424.
 (g) 2 Stra. 907; Fitz. 289.

(h) Willes, 255.
 (i) Carth. 136.
 (j) 2 Vern. 694.
 (k) Carth. 335.
 (l) 5 B. & Ald. 204.

this is a case of a defendant not having taken out letters of administration, and there being therefore no person whom the plaintiff could sue. *Webster v. Webster* (m), *Perry v. Jenkins* (n), *Douglas v. Forrest* (o), are to the same effect. The latter case can only be supported upon the ground on which, it is submitted, that this case must be determined, namely, that the plaintiff was not guilty of laches, as there was no one whom he could sue. These decisions furnished no case in favour of the Statute; under these circumstances the Statute does not apply, unless there is a continuing right to sue during the six years.

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Sir *F. Pollock*, *contra*.—The Statute of Limitations having begun to run at the time of *Hobson's* death, the plaintiff is barred by the efflux of time. It is said that it would be a great hardship to apply the Statute to a case in which a party has a cause of action for one day only, and then dies without having commenced it. No doubt extreme cases might be put, but a much greater inconvenience would result from the doctrine contended for by the plaintiff, namely that there must be, during every part of the six years, a plaintiff who can sue, and a person who can be sued, and if any interruption of either occurs, so much of the time is to be taken out of the calculation. Upon the same principle, it might be contended, that no *Sundays*, or days when offices are closed, should be included in the calculation. Here the impediment has arisen by the act of the plaintiff, in carrying on the contest for the office of executor. Where a disability is once removed, the Statute continues to run, notwithstanding any subsequent disability, either voluntary or involuntary, *Doe, d. Duroure v. Jones* (p). In this respect there has been a uniform construction of all the Statutes of Limitation. The 21 *Jac.* c. 16, contains nothing about defendants. In *Prideaux v. Webber* (q), to a plea off the Statute of Limitations, the plaintiff replied, that certain rebels had usurped the King's government, and none of the King's Courts were open; but the plea was held a good bar, because there is not any exception in the Act of such a case, and infants had been bound thereby, if not excepted. It might have been said that a civil rebellion was an exception, *ex necessitate*, but the Court held it was not. By the 1 *W. & M.* c. 4, in consequence of *Hilary Term*, 1688, not being kept, the time between the 10th *December* and the 12th *March*, is not included in computing the Statutes of Limitations. That could not have been necessary, if the doctrine contended for by the plaintiff could be supported. So in the 24 *Geo.* 2, c. 23, for changing the style, a clause is inserted for preserving all interests that would be affected. The next Statute is the 4 & 5 *Ann.* c. 16, which extended the 7th section of the Statute of *James*, to defendants.—[Sir *W. W. Follett* referred to *Snodde v. Ward* (r), upon the Statute of *William and Mary*.]—But it is said, that though you may sue a defendant who is abroad, yet in case of his dying abroad, you cannot sue his executor, without the assistance of the Court.—[*Alderson*, B.—If an action can be brought against an executor six years after the return of a testator, and he never returns, the effect would be that the executor might be sued at any time.]—*Murray v. The East India Com-*

(m) 10 Ves. 93.

(n) 1 Myl. & Cr. 118.

(o) 4 Bing. 686; 1 M. & P. 663.

(p) 4 T. R. 310.

(q) 1 Lev. 31.

(r) 3 Lev. 283.

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pany, and *Curry v. Stephenson*, shew this, that the Statute of Limitations does not apply, unless there is somebody capable of suing and of being sued. In the former case there was a defendant without a plaintiff, and if the party had died before the bill became due, there would have been no ground for the action. *Joliffe v. Pitt* is no authority for the position contended for on the other side. The Statute of *Ann* passed in 1705, and before the plaintiff was barred. *Perry v. Jenkins* is a decision of a Court of equity, and those Courts are not bound by the Statute. There the Chancellor's judgment only amounts to this, that a bill of revivor is not a new application made by another person, and that so far as the Statute was concerned, the action was commenced in due time. *Webster v. Webster* cannot be considered as an authority one way or the other: there, the ground of decision was, that the party was an executor *de son tort*. *Wilcocks v. Huggins* is a case in which the disability applies to the plaintiff; and the Court there said, that if the second executor had been retarded by suits about the will or administration, it would have altered the case; because then the neglect would have been accounted for. Where the disability is, in respect of the defendant, there is no case which has decided that, after the Statute has once begun to run, it does not continue in consequence of such disability. In *Matthews v. Phillips* there was no *laches* on the part of the plaintiff; in *Douglas v. Forrest* the Statute had never begun to run.

Sir *W. W. Follett* in reply.—There is a distinction between the case of a person who has a right to sue, and who has a defendant whom he may sue, but is prevented by the disability of being an infant, or *non compos mentis*, and where there is no one whom the plaintiff can sue. The case of *Doe, d. Duroure v. Jones* depends entirely upon the exempting clause of the Act, because the third section requiring the action to be commenced within six years, an infant having a cause of action would be barred, unless he came within the express words of the exception. But this is not a case within the enacting part of the Statute; to fall within it, the case must be one, in which the law does not prevent the party from suing. *Prideaux v. Webber* is no authority against the plaintiff, because there the legislature specially interfered to provide against an unforeseen event, *Snodde v. Ward*, which was decided under the Statute of *William and Mary* is a strong argument in favour of the view now taken. The legislature meant by the third section, that there should be a *laches* on the part of the plaintiff, and therefore it was thought right to legislate for that particular case. How is there a delay by the act of the plaintiff, he was appointed executor by a Court of competent jurisdiction though that appointment was afterwards reversed. No answer has been given as to the mode of construing the Act, namely, not by its words, but in order to give effect to the intention of the legislature; there is no authority whatever to shew that the Statute applies, where during a part of the six years, there is no person in *esse*, capable of being sued.

Lord ABINGER, C. B.—The Court entertains no reasonable doubt upon this case, or they would take time to consider their judgment. The question appears to lie in a narrow compass. It is said that such a case as this has never occurred, but I apprehend it will be found that similar cases have very frequently occurred in practice. A party in *England*, against whom a cause

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of action exists in 1829, (his creditor also being in *England*.) dies in 1830; after his death, some litigation takes place respecting his will, and some time elapses before letters of administration are granted to the defendant. They are granted in 1835, and in *September* of that year, the creditor commences his suit against the administratrix. The whole period from the first accruing of the action, embraces more than six years. But then it is contended, that although a cause of action accrued, and there was a party to sue, and another to be sued; yet because some litigation ensued at the death of the debtor, the plaintiff's right was suspended then, and that time is not to be included in the six years. Upon a plea of *actio non accrevit, &c.* or *non assumpsit infra sex annos*, I have never known that portion of the time deducted, which was occupied in proving the will. It is said, that the 3d section of the Statute of *James* contemplated that a complete cause of action, with the parties to sue and be sued, should exist during the whole six years. The meaning of the Statute clearly appears to me to be this, that where a cause of action has once accrued, with the capacity of suing and being sued, and the Statute has begun to run, it will continue to do so; and I concur in the doctrine laid down in *Wilcocks v. Huggins*. But then, it is said, that there are cases in equity in favour of the plaintiff. The cases in equity depend upon such a variety of circumstances on which the equity has arisen, that they cannot be cited as authority in Courts of law, especially where they contravene their decisions. In some cases Courts of equity may see manifest injustice in barring the debt, and may wish to do right between the parties. *Joliffe v. Pitt* has been referred to. There, at the time the debt accrued, both debtor and creditor were abroad, and no action could have been brought. The creditor returned in 1702, and then he commenced his suit against the debtor, which he kept alive for four years, when the debtor died abroad, having appointed an executor, who was also abroad. In the mean time, the Statute of the 4 & 5 Ann, c. 16, passed. In 1710, the executor came to *England*, and proved the will, and in 1714 the plaintiff filed his bill. There, the legislature had shewn, that the case of a debtor being beyond the sea, was a reasonable exception from the Statute of *James*. But there, it must be observed, that the party had commenced his action by original, within the six years of his return. Whether that case is founded on an equitable construction of the Statute, or whether it can be sustained by the words of the Statute, it is not necessary to inquire, because in the present case there was a power to commence an action, and none was commenced. *Murray v. The East India Company* stands upon a totally distinct ground. There, Mr. *Hope*, being abroad, dispatched some bills of exchange to his agent in *England*; on the passage home, Mr. *Hope* perished; the agent acting under a power of attorney, indorsed the bills, and it afterwards turned out that the agent's authority did not extend to the indorsement of bills, so that the Company could not defend themselves against the action. There, no administration of the effects of Mr. *Hope* was taken out until after the six years, and no cause of action existed at his death, as the bills were not then due; so no power of bringing an action by or against any body existed till administration was granted. The cases divide themselves into classes: first, where a creditor has commenced his suit, which is interrupted by his death, and his representative has commenced a new action, there, by analogy to the case of a judgment recovered, it has been held, that the representative is not barred by the Statute,

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but is to prosecute his suit within a certain reasonable time. Secondly, where no action has been commenced, on account of the party having no capacity to sue. This case falls within neither class, as there was a capacity to sue, but no action has been commenced. The argument of the plaintiff supposes the legislature to have foreseen all the cases of interruption by death, and to have intended the Statute should not apply to them at all. I should rather say, that the legislature did not think it necessary to make any provision respecting such cases, as the Statute ran when the action first accrued. But we find a declaratory law was necessary in the 1 *W. & M.*, c. 14, to prevent part of a year from being included, in computation upon the Statute of Limitations as there was a suspension of all law; therefore, the legislature, by its own enactment, has negatively shewn that in ordinary cases, where an action has accrued, and the Statute has begun to run, and during a part of the time there could, by no possibility, be both a plaintiff to sue, and a defendant to be sued, yet that such time is to be included in the computation. I am, therefore, of opinion, from the universal practice, the opinion of the legislature, and the reason of the thing, that, in this case, the time which occurred after the testator's death, and before administration was granted, must be included in the computation; and that therefore the judgment must be arrested.

BOLLAND, B.—During a great portion of the argument, I have doubted whether the plaintiff was not entitled to our judgment; and I concur, with some hesitation, with the rest of the Court.

ALDERSON, B.—I concur in the judgment given by my lord. It appears that the usual rule is, that if the Statute once begins to run, it will continue, that is to say, with a plaintiff to sue and a defendant to be sued; the date is fixed; much inconvenience would result if it were otherwise. There would be a great many beginnings and a great many endings to add up, to ascertain whether the Statute had fully run or not. It is far better that there should be a particular injury to one individual, than a general inconvenience to all persons. But the question is, what is the true construction of the Statute of Limitations? In cases where the testator has commenced a suit, an equitable construction has been put upon the Statute; but that construction is inapplicable here, and cannot be extended to this case. Upon the same equity the executor has a limited time to commence his action, and where he is guilty of no *laches*, it is, as it were, appending his action to the former suit; and in such cases, a longer period than twelve months has been allowed. So, in the case of a removal from an inferior Court, the defendant prevents the party from going on, and there, if the new suit is commenced within a reasonable time, it will date from the original suit. So of the woman who marries after action brought, if the husband and wife promptly commence a new suit, it shall be considered a continuation of the first. I do not say that these cases are founded upon a good principle, but they proceed upon an equitable construction of the Statute. *Joliffe v. Pitt* appears to have been decided either upon the ground, that the Statute of *Anne* applied, which may be very doubtful, or that being a suit in equity, and the Statute of *Anne* having passed before the Statute of Limitations completely ran, it might have been thought, that, from analogy to the Statute of *Anne*, it was not within the Statute of Limitations. *Douglas v. Forrest* was after the Statute of *Anne* passed. There the creditor,

while he had no cause of action, died abroad; and the Statute could not be considered to run until there was some one capable of suing. *Murray v. The East India Company* proceeded upon the same principle; so also in *Curry v. Stephenson*. But in the present case, there was a complete right of action in the testator's lifetime, which continued for some time with a capacity to sue a party who was in *England*. Extreme cases may be put on both sides; for them the legislature does not provide; and we are to decide according to the provisions of the Statute. I therefore think that the replication is bad; that the plea is well founded, and that the judgment must be arrested.

GURNEY, B., concurred.

Rule absolute.

HALL and others v. ROUSE:

THIS cause came on for trial at the *Liverpool* Summer Assizes, 1837, when the parties agreed to a reference; and an order of *Nisi Prius* was drawn up, by which it was ordered, that the jury find a verdict for the plaintiffs by consent, damages 1000*l.*, costs 40*s.*, subject to be reduced or vacated, and instead thereof, a verdict for defendant, or a nonsuit entered, according to the award thereafter mentioned, and by which the cause and all matters in difference were referred to the award of a barrister, so as he made and published his award in writing, on or before the 1st *November* then next; and with power to enlarge the time, as he should think fit. The usual stipulations were also inserted. The plaintiff's attorney neglected to deliver the order of *Nisi Prius* to the arbitrator until after the expiration of the time, within which the award was to be made. The parties subsequently met before the arbitrator, when the defendant refused to proceed with the reference. The cause was in consequence again set down for trial, and on the 18th *November*, the plaintiff's attorney obtained an order under the 1 *Will.* 4, c. 22, s. 4, to examine a witness who was ill, upon interrogatories. Examiners were appointed under this order, and the attorney for the defendant attended the examination and cross-examined the witness. No award was made, nor was any judgment entered on the record. The plaintiff afterwards gave notice of trial for the Spring Assizes at *Liverpool*, 1838, and entered and tried the cause. The counsel for the defendant objected to the trial taking place; but it being persisted in, they offered no defence. A second verdict having been found for the plaintiff.

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Where by an order of *Nisi Prius* a verdict was taken, subject to the award of an arbitrator, and the time for making the award expired before the order of reference was delivered to the arbitrator:—*Held*, that it was irregular to take the cause down again for trial, without setting aside the previous verdict; and that such irregularity was not waived by the defendant's attorney attending and cross-examining a witness, under an order for the examination of the witness on interrogatories.

Creswell, on a former day, obtained a rule to set it aside, and for a new trial.

Hoggins shewed cause.—The defendant is not in a situation to make this application, since, if there has been any irregularity, he has consented to waive it, by the steps he has taken since he knew that the arbitrator could not make an award. By attending the order for the examination of the plaintiff's witness, and by cross-examining, he has admitted the propriety

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of the cause being again sent down for trial. That proceeding could only have been with a view to another trial, as the defendant had already refused to proceed with the reference. Then no award having been made the plaintiff had a right to try the cause again. *Harper v. Abrahams (a)*, and *Hall v. Phillips (b)*, are express authorities on that point.—[Parke, B.—In *Harper v. Abrahams*, the arbitrator died, but the objection arises from the lapse of the time, for making the award: May not the time be extended, under the 3 & 4 W. 4, c. 42, s. 39?—It is submitted, that the Statute will not apply to a mere order of reference, which has never been acted upon.

Creswell and Henderson in support of the rule.—A verdict having been taken, subject to a reference, it is irregular to take the cause again down for trial, until that verdict has been disposed of, *Evans v. Davies (c)*. The fact of no verdict having been entered on the record does not alter the case, as there could be no entry until the award was made. Secondly, there has been no waiver of the irregularity. The order of reference has not become a nullity, since it was competent for either party to apply under the 3 & 4 Will. 4, c. 42, s. 39 for an enlargement of the time, even after it had expired, *Potter v. Newman (d)*. Then the order of reference being in force, it was no waiver to attend and cross-examine the plaintiff's witness. It is the constant practice, to order a commission for the examination of witnesses while a new trial is pending. The order in this case, is made prospectively; and it is to be assumed, that the party obtaining it, will do all that is necessary to put himself in a proper situation, to enable him to use it at a subsequent trial.—[Alderson, B.—It appears from the case of *Bacon v. Creswell (e)*, that an application should have been made to try, *de novo*, but if a new trial is to be had, the examination must be considered as made upon a valid order and as if, in fact, the former verdict had been set aside.]

PARKE, B.—I was at first impressed with an idea that there had been a waiver of the irregularity; and indeed I had some doubt whether there was any irregularity at all. It seems to me, however, that there is no substantial difference, between an entry in the book of the associate and an entry upon the record; the order of reference is an admission that there has been a verdict, and that must be got rid of before the cause can be tried again. It would be irregular to suffer the former verdict to remain, unless both parties agreed to waive it. The plaintiffs have shewn their intention so to do; and if there had been any act done by the defendant, not merely a non-feasance, but an act necessarily importing that a second trial must take place, I should have been of opinion that the rule must have been discharged. I was at first struck with the argument of Mr. *Hoggins*, who contended that the cross-examination of the witness was such an act, but that proceeded upon the assumption that no valid order could be made for the examination of a witness while the former verdict remained. But I see nothing to prevent the Court from making a prospective order. There are no words of restriction in the Act of Parliament. It seems to me that the examination of the witness was

(a) 4 Moore, 3.

(b) 9 Bing. 89.

(c) 3 Dowl. P. C. 786; 1 Gale, 150.

(d) 2 C., M. & R. 742; 1 Gale, 373.

(e) 1 Hodges, 189.

a valid examination, although the former verdict stood upon the record. I am of opinion that there was no waiver, and that the rule must be absolute.

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ALDERSON, B.—I am of the same opinion. It was irregular to try the cause again after a verdict had been taken at *Nisi Prius*. If the arbitration could not be proceeded with, it was competent for the plaintiff to apply to the Court to set aside the verdict; *Bacon v. Cresswell* is an authority for that position. But then, it is contended, that the irregularity has been waived. Though the cross-examination of the plaintiff's witness is clearly an admission that if a new trial is to take place, the arbitration is at an end; I do not see how it is a waiver of the former verdict, inasmuch as it might have been done upon a tacit condition that the party should put himself in a situation to proceed at the next Assizes. Though an action is still pending, an order for the examination of witnesses may be made, upon the faith, that the party obtaining it, will put himself in a condition to try regularly. For these reasons I think the second trial irregular.

GURNEY B., concurred.

Rule absolute.

PENNEY v. The GREAT WESTERN RAILWAY COMPANY.

DEBT. The declaration stated, that heretofore, and after the making of a certain Act of Parliament, made in the 5 & 6 Will. 4, intituled, "An Act for making a Railway from *Bristol* to join the *London and Birmingham* Railway, near *London*, to be called the Great Western Railway, with branches therefrom to the towns of *Bradford* and *Trowbridge*, in the county of *Wilts*;" and also after the making of a certain other Act of Parliament, made in the 1 *Victoria*, intituled, "An Act to enable the Great Western Railway Company to extend the Line of such Railway, and for other purposes relating thereto;" the plaintiff, by notice in writing, then left at the office of the defendant, required the defendants to purchase a certain mansion-house and

The 1 Vict. c. 107, s. 28, (the Western Railway Act) enacted, "That whereas the intended railway and works are intended to pass nearly contiguous to a mansion-house and twelve acres of land, 'belonging to *William*

Penney, Esq.," be it enacted, That in case the said *William Penney*, by notice in writing, shall require the said Company to purchase the said mansion-house and land, it shall be lawful for them, and they are required to treat for the purchase thereof, and for the compensation to be made to the said *William Penney*, his heirs, &c., in respect of the same; and in case the parties shall not agree as to the value or the compensation to be given, then the amount shall be ascertained by the verdict of a jury; and in case default shall be made by the Company in payment of the sum or sums to be settled and agreed upon, or ascertained by the verdict of a jury, for the space of two calendar months after the same shall have been settled, agreed upon, or awarded, then it shall be lawful for the person to whom such money ought to be paid to sue for and recover the same by action of debt, in any of her Majesty's Courts at *Westminster*." Under this section a jury was impanelled, and awarded 7,502*l.* as a compensation to the plaintiff. The declaration stated that the plaintiff, by a notice in writing, left at the office of the defendants, required them to purchase a certain mansion-house and land belonging to him, the plaintiff, and mentioned in the Act of Parliament. It then stated the summoning of the jury, and that they gave a verdict for 7,502*l.* as compensation to the plaintiff; and that long before the commencement of this suit, two calendar months had elapsed after the time at which the amount had been awarded, that the defendants had not paid, but therein had wholly failed and made default. *Pleas: first*, that from the time when the compensation was so awarded the defendants had always been ready to pay the sum, upon the plaintiff's making or shewing a good and sufficient title. *Secondly*, that at the time the jury ascertained the said sum of 7,502*l.*, and from thence hitherto, the plaintiff had not any good and sufficient title to the mansion-house and lands:—*Held*, upon demurrer to the pleas, that it was consistent with the declaration that the plaintiff might have parted with his title after the passing of the Act, and that the declaration was insufficient, for not shewing a default of payment pursuant to the Act of Parliament. *Semble*, That the words "belonging to *William Penney*, Esq.," were not conclusive of the plaintiff's title.

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land belonging to him, the said plaintiff, and mentioned in the Act of Parliament here-inbefore secondly mentioned. And whereas the plaintiff and defendants did not thereafter, nor at any time, agree as to the value of such mansion-house and land, nor as to the compensation, recompence, or satisfaction to be made to the plaintiff in respect thereof, of all which premises the defendants afterwards, to wit, &c., had notice. And whereas also afterwards, to wit, on the day and year last aforesaid, the defendants issued a warrant under their common seal, to the sheriff of *Middlesex*, commanding him to impanel, summon, and return a jury, &c., qualified, &c., to be returned for the trial of issues in her Majesty's Courts of record at *Westminster*; and the plaintiff says, that the said mansion-house and land were and are situate in the county of *Middlesex*; and that neither the said sheriff, nor his undersheriff, at the time of giving such notice as aforesaid by the plaintiff to the defendants, nor at any time before or since, was one of the defendants, nor enjoyed any office of trust or profit under them, nor was in any way interested in the matter in question, of all which the defendants, to wit, &c., had notice. And the plaintiff further saith, that after the issuing of the warrant, to wit, &c., seven days' notice in writing of the time and place at which such jury were by the warrant, appointed and required to be returned, was given by the defendants to the plaintiff, by delivering such notice to the plaintiff; and the plaintiff further saith, that after the issuing of the warrant, to wit, in *November*, 1837, the sheriff did, in obedience to the warrant, impanel, summon, and return a jury of sufficient men, qualified, &c., whereof the defendants had notice; and the plaintiff further says, that afterwards, to wit, on the day, &c., and at the place in the warrant mentioned, and at which the jury were, by the warrant, appointed and required to be returned, to wit, on the 30th of *November*, 1837, at the sheriff's office, in *Red Lion Square*, in the said county, the persons so impanelled, summoned, and returned, did appear before the sheriffs, and a jury of twelve men were afterwards, to wit, &c., drawn by the sheriffs, as juries are by law directed to be drawn; and the said jury afterwards, to wit, on the 1st of *December*, 1837, did, upon their oaths, inquire of, assess, ascertain, and give a verdict for the amount to be paid to the plaintiff, as and for the value of the said mansion-house and land, and the compensation, recompence, and satisfaction to be made to the plaintiff in respect thereof, and did then, by their verdict, ascertain and assess such amount to be 7,502*l.* of lawful money, &c., and did then and there duly give their verdict for the said sum, to be paid to the plaintiff by the defendants; and the said amount was, to wit, &c., ascertained by the verdict of the jury, in the manner provided by the Act of Parliament first mentioned, for ascertaining and settling the value or recompence for other lands, tenements, &c., to be taken or purchased for the purposes of the said Act of Parliament here-inbefore first mentioned; and the sheriff did afterwards, to wit, &c., adjudge and order the said sum to be paid by the defendants to the plaintiff, of all which the defendants afterwards, to wit, &c., had notice. And the plaintiff further says, that long before the commencement of this suit, to wit, on the 2d of *February*, 1838, the space of two calendar months had elapsed from and after the time at which the said sum of money had been so awarded by the jury as aforesaid, and that the defendants, both before and after the said space of two calendar months had elapsed, to wit, &c., and on divers other days and times, were requested by the plaintiff to pay him the sum of 7,502*l.*, but that the defend-

ants have not paid the same, nor any part thereof, but have therein wholly failed and made default, and still refuse to pay, &c., and the same remains wholly unpaid to the plaintiff, whereby an action hath accrued, &c., to demand the said sum.

Pleas: first, the defendants say, that from the time when the amount to be paid to the plaintiff for the value of the mansion-house and land in the declaration mentioned, and the compensation, recompence, and satisfaction to be made to the plaintiff in respect thereof, was ascertained and assessed by the jury at the said sum of 7,502*l.*, hitherto; the defendants have been always ready and willing to pay to the plaintiff the said sum, upon the plaintiff making or shewing to the defendants a good and sufficient title to the said mansion-house and lands. And the defendants further say, that long before the commencement of this suit, and within the space of two calendar months after the said sum of money was so ascertained, assessed, and awarded by the jury, as in the declaration mentioned, to wit, on the 21st of *December*, 1837, the defendants did request the plaintiff to make or shew to them, the defendants, a good and sufficient title to the said mansion-house and land, and then offered to pay to the plaintiff the said sum of 7,502*l.*, upon his making or shewing to them a good and sufficient title to the same, but that the plaintiff did not, when so requested as aforesaid, or at any other time, make or shew to the defendants a good and sufficient title to the said mansion-house and land, but hath hitherto wholly refused and neglected so to do. *Verification.*

Second plea: and the defendants, for a further plea in this behalf, say, that the plaintiff had not, at the time when the said jury ascertained and assessed the said sum of 7,502*l.*, as in the declaration mentioned, nor from thence hitherto, any good or sufficient title in him, the plaintiff, to the said mansion-house and land; and that the plaintiff has been, from the time when the said jury so ascertained and assessed the said sum as aforesaid, hitherto unable to make or procure a good and sufficient title to the said mansion-house and land, or to convey to or vest in, or procure to be conveyed to or vested in the defendants, a good and sufficient title to the same; nor would a good and sufficient title to the same have passed to or vested in the defendants, upon the payment of the said sum at any time after the said sum was so ascertained and assessed as aforesaid. *Verification.*

Special demurrer and joinder.

The points stated for argument by the plaintiff were, that the right of action is given by Stat. 1 *Vict.*, c. 92, s. 28 (local and personal, public), upon the expiration of two months from the verdict without proof of title, and that the plaintiff's title is recognized by the same section. The points stated by the defendants were, that upon the true construction of the Statutes mentioned in the declaration, the plaintiff is not entitled to claim the sum of money sought to be recovered, without having and making, or at least without having, a title to the premises; also, that assuming the Statute 1 *Vict.*, c. 92, s. 28, does recognize a title in the plaintiff, yet that such recognition does not extend to any time subsequent to the passing of the said Act; also, that it does not appear on the record what estate the plaintiff pretends to have, or to convey to the defendants.

Sir F. Pollock, in support of the demurrer.—The Acts of Parliament applicable to this case are the 5 & 6 *Will.* 4, c. cvii, and the 1 *Vict.*, c. xcii;

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and the question turns upon the 28th section of the latter Act (a). That section expressly provides for the estate of Mr. *Penney*, and therefore the 39th & 40th sections (b) of the 5 & 6 Will 4, c. cvii, do not affect the case, since it

(a) Sec. 28. "And whereas the said intended railway and works are intended to pass nearly contiguous to a mansion-house and twelve acres of land at *West-borne*, in the said parish of *Paddington*, belonging to *William Penney*, Esq.; be it therefore enacted, That in case the said *William Penney*, his heirs or assigns, shall, by notice in writing, to be left at the office of the said Company, require the said Company to purchase the said mansion-house and land, it shall be lawful for the said Company, and they are hereby required, within thirty days after the service of such notice, to treat for the purchase of the said mansion-house and land, and for the compensation, recompence, or satisfaction to be made to the said *William Penney*, his heirs, executors, administrators, or assigns, in respect of the same; and in case the party so giving such notice and the said Company shall not agree as to the value of such mansion-house and land, or as to the compensation, recompence, or satisfaction to be made to such party in respect thereof, then the amount to be paid to such party shall be ascertained by the verdict of a jury, in the manner provided by the said first-mentioned Act for ascertaining and settling the value or recompence for other lands, tenements, hereditaments, and premises to be taken or purchased for the purposes of the said Act; and that in case default shall be made by the said Company in payment of the sum or sums of money to be settled and agreed upon or ascertained by the verdict of a jury, as and for such value, compensation, recompence, and satisfaction as aforesaid, or of any part of such sum or sums of money, for the space of two calendar months after the same shall have been settled and agreed upon or awarded by such jury as aforesaid, then and in every such case it shall be lawful for the person or persons to whom such sum or sums of money ought to be paid, to sue for and recover the same by action of debt, or on the case, in any of her Majesty's Courts of record at *Westminster*."

(b) Sec. 39 enacts, "That in case any party, to whom any money shall be agreed or awarded to be paid for the purchase of any lands to be taken or used under or by virtue of the powers of this Act, or for any interest, or for compensation as aforesaid, shall refuse or neglect to accept the same, or to con-

vey the premises, or interest in the premises purchased, or shall refuse, neglect, or be unable to make a title to such premises, or to such interest in the premises, to the satisfaction of the said Company, or shall be absent from *England*, or shall not be conveniently found, or if any party entitled unto, or to convey such lands, or such interest therein, cannot be conveniently known or discovered, or be not shown to the satisfaction of the said Company to be such party, then and in every such case it shall be lawful for the said Company to order the money so agreed or awarded as aforesaid to be paid into the Bank of *England*, in the name and with the privy of the Accountant General of the said Court of *Exchequer*, to be placed to his account, to the credit of the parties interested in the said lands, subject to the controul and disposition of the said Court; which said Court, on the application of any party making claim to such money, or to any part thereof, by petition, is hereby empowered, in a summary way of proceeding or otherwise, to order the same to be laid out and invested in the public funds, and to order the distribution thereof, or payment of the dividends thereof, according to the estate, title, or interest of the party making claim thereunto, and to make such other order in the premises as to the said Court shall seem proper."

Sec. 40. "Provided always, and be it enacted, That where any question shall arise in reference to the provisions aforesaid, or otherwise upon this Act, touching the title of any party to any lands, or to any interest in any land, or to any compensation money in respect of damage done to any lands, or to any money to be paid into the Bank of *England* for the purchase of any lands, or of any estate, right, title, or interest in any lands to be taken or used in pursuance of this Act, or for compensation as aforesaid, or to any annuities or securities to be purchased with any such money as herein mentioned, or to the dividends or interest of any such annuities or securities, the parties respectively who shall have been in possession or receipt of the rents or profits of such lands at the time of such purchase; and all persons and corporations claiming under such parties, or under or consistently with the possession of such parties, shall be deemed to have been lawfully

falls within the words of the 1st section of the 1 & 2 *Vict.* (c), "otherwise provided for." When the Bill was before the committee, this estate must have been the subject of inquiry, and there must have been either proof or an admission of the plaintiff's title. The plaintiff has complied in all particulars with the terms of the 28th section, and the money awarded not having been paid within two months, he is entitled to bring this action. A similar clause is found in the *Paddington Canal Act*, 52 *Geo.* 3, c. cxcv, s. 186. The 39th & 40th sections of the 5 & 6 *Will.* 4, do not apply; but even assuming that they are applicable, the defendants should have paid the money into the Bank of *England*. They have no right to question the plaintiff's title in this form; they, in fact, put in issue a matter of law. If they meant to say, that since the passing of the Act the plaintiff has ceased to have a good title, they should have expressly shown in what manner, *Scales v. Pickering* (d). It is clear, from the terms of the 28th section, which enable the party to sue, in case of default in payment of the sum ascertained by the jury, that it was never intended that any question should be raised as to title.—[*Alderson*, B.—There is no averment in the declaration that the plaintiff tendered a conveyance; but merely that the compensation has been assessed, and that it has not been paid within the two months.]—The plaintiff was not bound to tender a conveyance. If the Company had tendered one, which the plaintiff refused to execute, it might have altered the case. Suppose, instead of pleading the defendants had demurred generally to the declaration, there would then have been an admission that the Company had made default. The defendants cannot be in a better situation by pleading over. The plaintiff's title is shewn by the Act of Parliament, and he is not bound in his declaration to do more than follow the words of the section. Under the second plea, the defendants should have shewn in what manner the plaintiff's title had passed out of him.

Sir *W. W. Follett*, *contra*.—The argument on the other side goes to this extent, that although the plaintiff may have but a leasehold interest, or may have parted with the property, still he is entitled to recover compensation. There should at least be some ownership shewn. The property in question cannot be held by the Company; but still they are obliged to buy it, in order that they may sell it again. The declaration contains no averment that the plaintiff was seized or possessed of this property, or that it belonged to him at all; but only avers notice of the amount found by the jury, and that

entitled to such lands, or such interest therein, or to such money as aforesaid, according to such possession, until the contrary shall be shewn to the satisfaction of the said Court; and the dividends or interest of the annuities or securities to be purchased with such money, and also the capital of such annuities or securities, shall be paid, applied, and disposed of accordingly."

(c) Sec. 1, 1 *Vict.*, c. 92. "Be it enacted, That all the powers, authorities, provisions, directions, penalties, forfeitures, payments, exemptions, remedies, regulations, clauses, matters, and things contained in the said recited Act, or either of them (except such of them, or

such parts thereof respectively as are, by the said last-recited Act, repealed, altered, or otherwise provided for), shall extend, and be construed to extend to this Act, and to the several works and things hereby authorized or required to be made and done, and shall operate and be in force, in respect to the objects and purposes of this Act, as fully and effectually, to all intents and purposes whatsoever, as if the same powers, authorities, provisions, directions, penalties, forfeitures, payments, exemptions, remedies, regulations, clauses, matters and things were repeated and re-enacted in this Act."

(d) 4 *Bing.* 452.

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two months had elapsed since it was ascertained, and that the defendants had made default in payment. The pleas state, that the defendants were always ready and willing, and offered to pay, upon receiving a good title. Then the question is, whether the defendants are to pay this sum of money, and receive nothing in return. If this be considered a bargain sanctioned by Act of Parliament, it is a necessary part of it that the vendor should make out a good title. On referring to the Acts of Parliament, it will be found that the first Act is not applicable to this case. The 28th section of the second Act refers to the 24th section of the former one; but that section, and the 39th, 40th, & 42d (e) of the former Act, may be referred to, for the purpose of shewing that a good title is in all cases to be made out. By the 42d section the money is to be paid within three months of the award of the jury; so that if that section applies, the action is brought too soon.—[*Alderson, B.*—Should you not have pleaded that the plaintiff could not make a good title, and that therefore you had paid the money into the Bank of *England*?]—If the clauses of the former Act apply, they are an answer to this declaration; and under them the defendants may be compelled to pay in the money to the Bank of *England*; but if, as the defendants contend, they are not applicable, a payment of the money into the Bank of *England* would afford no protection. The 28th section, upon which this action is brought, is a very unusual one, though it is said that a similar clause is to be found in the *Paddington Canal Act*; but under the 186th section of that Act, a leaseholder is bound to produce his lease, as evidence of his title. Here the plaintiff contends that he is entitled to the money, without even delivering an abstract of title. The 13th section of the 5 & 6 *Will. 4*, which enables all persons, whether under disability or not, to sell and convey lands, has no reference to this case, as this property is not “taken for the purposes of the Act,” but under an express contract. It is, therefore, incumbent on the plaintiff to make out a good title, *Flureau v. Thornhill* (f), *Souter v. Drake* (g), *Doe, d. Gray v. Stanion* (h), *Shepherd v. Kealley* (i). If the words “belonging to,” are to be construed as a statutory recognition of the plaintiff’s title, still they cannot extend beyond the time of the passing of the Act. If the argument on the other side be correct, no title could be required, even though the compensation was

(e) Sec. 42. “And be it further enacted, That upon payment or legal tender of such sums of money as shall have been agreed upon between the parties, or awarded by a jury in manner aforesaid, for the purchase of any lands, &c., or as a compensation for any loss or injury, as aforesaid, to the respective proprietors of such lands, or other persons respectively interested therein, and entitled to receive such money, or compensation respectively, within three calendar months after the same shall have been so agreed upon or awarded, or if the parties cannot be found, or shall be absent from *England*, or shall refuse to receive such money as aforesaid, or shall refuse, neglect, or be unable to make a good title to such lands, or if any party entitled unto, or to convey such lands, shall not be known, or shall

be absent from *England*, or shall refuse, neglect, or be unable to convey the same, then upon payment of such money into the Bank of *England*, to the credit of the parties interested, to an account, *Ex parte The Great Western Railway Company* then and in every of such cases, it shall be lawful for the Company to enter upon such lands; and thereupon such lands, and the fee-simple and inheritance thereof, together with the yearly profits thereof, and all the estate, use, trust, and interest of all parties therein, shall thenceforth be vested in and become the sole property of the said Company, for the purposes of this Act.”

(f) 2 W. Black. 1078.

(g) 5 B. & Adol. 998.

(h) 1 M. & W. 695.

(i) 1 C., M. & R. 117.

awarded five or six years after the Act passed. Suppose the plaintiff had died, and the action had been brought by his heir, could it be contended that in such case no title could be asked for? But it is further objected, that upon these pleas matter of law is submitted to the jury. The same observation will apply to all questions of deposit, and to many others. It is submitted that the plaintiff cannot recover without proof of his title, much less with an admission on the record, that he has none.

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Sir *F. Pollock*, in reply.—The 79th section (*j*) of the 5 & 6 *Will.* 4, shews that the 13th section is applicable to lands taken on the requisition of the owner. This is clearly land which is taken “in the execution of the powers of the Act,” and for the purposes of the Act. The cases cited do not shew that a title may be called for in such a case as this. The title is admitted, otherwise there would have been some provision respecting cases of disputed title, as there is regarding other lands through which the railroad is to pass. The defendants are to prepare a conveyance, and tender it. It is said that there is no averment that the property was the plaintiff’s; but there is a notice to the defendants to buy land *belonging* to the plaintiff, and that averment has not been traversed. The clauses respecting the payment into the Bank of *England*, do not affect the plaintiff’s right to recover here. If there were defence on that ground, it should have been pleaded. The mere payment of money would have vested the right to the land in the defendants, without a conveyance.

Lord ABINGER, C. B.—This is a case of very considerable importance. It is contended, on the one hand, that the 28th section of the second Act of Parliament concludes the defendant, as to the title; upon the other hand, it is contended that the Act is nothing more than a legislative recognition of a contract between the parties. I do not wish, however, to pronounce any definite or conclusive opinion upon that point, because I think it unnecessary upon these pleadings; but I must say, that according to the received opinion of private Acts of Parliament, between parties they are considered more in the nature of contracts than any thing else. I remember hearing that laid down by Lord *Kenyon*, who said, “he never treated private Acts of Parliament as any thing more than contracts between individuals.” And in this particular case we must conclude that Mr. *Penney* was disposed to make

(*j*) Sec. 79. “And be it further enacted, That if in the execution of any of the powers of this Act. any land shall be cut through and divided, so that what shall be left thereof on both sides, or on either side of the said railway, shall be less than half a Statute acre in quantity, and if the owner of any such land shall not have any other land adjoining to that which shall be so left on either side of the said railway, then and in every such case, if such owner shall so require, but not otherwise, the said Company shall also purchase the land so left on both or either of the sides of the said railway, being less than half a Statute acre in

quantity as aforesaid, the value thereof to be ascertained (if the parties differ about the same) in the same manner as is directed concerning any land to be taken or used for the purposes of this Act; or in case such owner as aforesaid shall have any other land adjoining to that which shall be so left, he may require the said Company, at the expence of the said Company, to throw the same into the adjoining land of such owner, by removing the fences, and levelling the sites thereof, and soiling the same in a sufficient and workmanlike manner.”

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some contract with the Company, and they with him, before this clause could have found its way into the Act of Parliament; and having made such a contract, it could not have been legalized without a parliamentary recognition; because, consistently with the terms of the former Act of Parliament, the Company could not have bought an estate of him, which they did not want for the purposes of the railway. If they had wanted any part of it, leaving him no more than half an acre on each side, it would have come within the 79th clause, and he could have obliged them to take the remainder. The whole question turns upon this, whether the words, "belonging to," in the Act of Parliament, are to be considered as a conclusive declaration of the title. I must own that the inclination of my opinion is, that it was still left open to the Company to contend that the lands actually belonged to some other person, and that Mr. Penney was not the owner. But, however, I do not mean to pronounce any opinion upon that subject now, because it appears to me that Mr. Penney cannot recover upon this record; because even assuming that he had a title at the time the Act passed, it was competent for him at any time afterwards to convey that title, such as it was, to any other person; and it appears to me to be perfectly consistent with the declaration, and with the second plea, that Mr. Penney, after the time of this Act of Parliament passing, and even before the time when the jury were summoned for the purpose of ascertaining the value, had parted with all he had, and if he had done so, I do not see how that could be better stated than is done by this plea. This has been likened to the case of landlord and tenant, in which the latter cannot plead *nil habuit in tenementis*; but that analogy does not hold. I think a good and sufficient title, means a good legal title. Now, if he had conveyed away his estate to somebody else, who really had a title such as he had, could it be said that the Company undertook to pay him the money, upon the construction of the words, that such party is the party who is to bring the action? I apprehend that would not be a correct application of the words of the Act. It does not mean that if Mr. Penney should sell his estate, he shall receive its value from the jury by their verdict, or by private agreement of the parties, when he himself had conveyed his title away; for it is the same whether the value is ascertained by private contract, or by the verdict of a jury. We cannot, therefore, I think pronounce judgment here on this record in favour of the plaintiff, that he should receive a sum of money at that time, when it may be upon the pleadings that he had no interest whatever. I agree, that by the rules of pleading, nothing is admitted that is not well pleaded. And Sir F. Pollock says, that if the fact had been so, that the defendants ought to have pleaded that; and said, notwithstanding you had a title at the time when this Act passed, yet you have since conveyed this title away. I do not think that was necessary; it was sufficient to say that, at the time when this demand is made, there is no title whatever. It appears to me that presents an issue which might have been taken. I see no objection to join issue upon that; but the plaintiff has demurred, and it appears to me that he is precluded from asking the Court for judgment, upon the grounds I have stated.

BOLLAND, B.—I am of the same opinion.

ALDERSON, B.—It appears to me that the plaintiff cannot recover upon these pleadings. On looking at the clauses of these Acts of Parliament, it seems

very doubtful whether there is any conclusive admission of the plaintiff's title; and the inclination of my mind is, that the words "belonging to *William Penney, Esq.*" ought not to have the construction contended for by the plaintiff, but that they leave it open to the parties to question whether *Mr. Penney* had any title at all. If it were not so, this absurdity would follow, that the party who, under that construction of the Act, would be entitled to receive the money, might so receive the value, without being the person to whom the money ought to be paid. And when we come to consider the nature of the question, and also what the pleadings are, I think that the declaration is not sufficient in not properly averring any default, upon the existence of which alone it is that this action is maintainable. The Act speaks of "land belonging to *William Penney, Esq.*" and gives him power, if he chooses, to require the Company to take it, and if the parties cannot agree as to the value, a jury is to be impannelled to determine the value, not to determine in whom the property is. Then that being done, I consider the verdict of the jury just as if the parties had arranged and agreed between themselves as to what should be the value of the land; and then it comes to this, suppose the one had required the other to purchase, and the latter had agreed to take the land, and they had arranged between themselves that the value was 7,502*l.*, does it follow from thence, that within two months the Company is to pay that sum, without any further act upon the part of *Mr. Penney* to shew that he has any thing to convey to the Company for the money? It seems to me that the default of payment, in respect of which the action is to be brought, is default of payment pursuant to the Act of Parliament; and if former clauses of former Acts of Parliament apply, there would be no default of payment, until either they had omitted to pay to *Mr. Penney* himself, or under certain circumstances into the Bank of *England*, subject to the opinion of the Court. If it stood there, then it would seem to me that the declaration was insufficient, in not averring a default, upon which alone the action of debt could be maintained. But the case does not rest there, because the plea goes on to state, that after the time when the jury had assessed the amount of damages, and from that time until the commencement of the action, the Company have been always ready and willing to pay to the plaintiff the sum of money, upon his making or shewing a good and sufficient title. Then, upon the second plea, the Company undertake to shew, that at the time the jury ascertained the value, the plaintiff had no title at all. Therefore, putting a construction the most favourable for the plaintiff, we cannot go beyond this, that it is *prima facie* to be considered his property, until the contrary be shewn. By the second plea, the Company undertake to prove the contrary; and they bring it within the rule of this Court, as laid down in the case of *Shepherd v. Keatley*, namely, that when a party had, by a specific agreement, undertaken not to ask for the title of the lessor, supposing it was complete, yet it was competent for the party buying to shew that the vendor had no title at all. I cannot carry the construction of these clauses further than in making it unnecessary for *Mr. Penney*, in the first instance, to shew a title; that is the utmost extent; and it seems to me that the second plea is a complete answer.

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GURNEY, B., concurred.

Judgment for the defendants, with liberty for the plaintiff to amend on payment of costs.

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JONES v. RYDER.

An unstamped promissory note cannot be used as an acknowledgment under the 9 G. 4, c. 14, to take a debt out of the Statute of Limitations. A mere parol statement by the parties within six years of the commencement of the suit, of a debt previously existing and ascertained, is not sufficient to support a count on an account stated, so as to defeat the Statute of Limitations.

DEBT for interest and for money due upon an account stated.

Pleas: Nunquam indebitatus, and the Statute of Limitations.

Replication to the last plea, that the cause of action did accrue within six years.

At the trial, before *Williams, J.*, at the Spring Assizes, 1837, for the county of *Montgomery*, the only witness called was a sister of the plaintiff, who stated, that on the 5th *January*, 1832, the defendant came to the plaintiff's house, and said he was come to settle with him, and asked for the old note. The plaintiff said he wanted the money, the 15*l.* that they had made an account of. An old account for 32*l.* was produced; defendant put it into the fire. There was 12*l.* from the old account, and 3*l.* they put to it; they reckoned it up 15*l.* Then defendant made a new note, and my mark was put to it. The defendant signed it and wrote it.

The promissory note, which was on a shilling stamp, was offered in evidence, as an acknowledgment by the defendant, to take the case out of the Statute of Limitations. It was as follows:

"Upon demand I promise to pay to *Jeremiah Jones* the sum of 15*l.* with lawful interest for the same, for value received, this 5th day of *January*, 1832.
R. Ryder.

The mark ✕ of *Elinor Jones*."

The learned judge directed the jury to find for the plaintiff; and they found the debt to be 15*l.*, and the interest 4*l.* 12*s.* 6*d.* separately. Leave was given for the defendant to move to enter a nonsuit, or to enter the verdict for the amount of the interest.

Alexander having obtained a rule accordingly,

Jervis shewed cause.—The plaintiff was entitled to recover upon the account stated. It is admitted that the note, being on a wrong stamp, could not be read as evidence of an account stated, *Green v. Davies* (a), *Jardine v. Payne* (b). But the account stated might be proved either by parol, or by this note, as a memorandum in writing, with 9 *Geo.* 4, c. 14, s. 8. An account stated may be either a new debt, or a winding up of the old accounts. Here there had been an original debt of 32*l.*, then an account was stated between the parties, by which the old debt was destroyed, and the new one created, *Smith v. Forty* (c). The cases of *Green v. Davies* only decided that the note could not be read to prove an account stated; but it did not determine that the account could not be shewn *aliunde*.—[*Parke, B.*—Is there any new consideration? My opinion has always been, that unless there be a new consideration, evidence of an account stated does not take the case out of the

(a) 4 B. & C. 235.

(b) 1 B. & Adol. 663.

(c) 4 C. & P. 126.

Statute.]—The old note was asked for, and the defendant took it and put it into the fire, and then gave the new note. There was, then, some detriment to the plaintiff, which would be a sufficient consideration to support a new promise. The note was an acknowledgment, signed by the party chargeable, and is exempted from stamp duty by the 8th section of the 9 Geo. 4, c. 14, *Morris v. Dixon* (d). But it is said that that section only applies to such instruments as are in their nature agreements, and that if language be used which technically amounts to a promissory note, though on blank paper, it will not fall within the operation of this Statute.—[*Parke, B.*—The distinction between *Morris v. Dixon* and the present case is, that there the instrument could not be stamped with any other stamp but an agreement stamp.]—If the debt can be proved *aliunde*, and the instrument is merely used for a collateral purpose, it is submitted that it would come within the terms of the Act.—[*Parke, B.*—The general rule is, that an instrument ought to be stamped according to its legal operation. This instrument is, to all intents and purposes, a promissory note. If the words of the 9 Geo. 4, c. 14, had been, that “no memorandum under this Act” shall require a stamp, there could have been little doubt about the case.]—The question simply is, whether the paper is a writing made necessary by the Act, and whether it is used for the purposes of the Act; for if so, it is exempt from stamp duty.

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Alexander and Welsby, contra, were stopped by the Court.

PARKE, B.—I am sorry to be obliged to come to the conclusion that the objection made to the admissibility of this paper must prevail, and that the rule must be absolute for entering a nonsuit. Two points have been made: first, it is said that there was evidence of an account stated, independently of the promissory note. It appeared that a meeting of the parties took place at the plaintiff's house, when the defendant said, he was come to settle, and asked for the old note, when an old account for 32*l.* was produced, which the defendant put into the fire. 12*l.* was remaining from that, which was made up to 15*l.*, and then the new note was given. Now, nothing occurred to shew that the parties intended to convert the interest into principal; if so, it might have been questionable whether there was not an intention to convert the old into a new debt. The case of *Smith v. Forty* may be supported upon the ground that it was then agreed that interest should run, from the statement of the account. But it is clear that no case can be taken out of the Statute, where nothing passes between the parties but a parol acknowledgment of a debt before ascertained, and where there is no evidence of such an account stated as to create an original cause of action.

Then, let us see if this instrument could be read in evidence. It is, unquestionably, a promissory note, and the rule is, that a stamp must be impressed, according to the nature of the instrument, as it appears upon the face of it. If this instrument had been stamped as an agreement, it could not have been used. Then, unless Lord *Tenterden's* Act applies, it cannot be read for the purpose of shewing any legal contract. The words of the 8th section are, “that no memorandum, or other writing, made necessary by this Act, shall be deemed to be an agreement within the meaning of any Statute

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relating to duties of stamps;" the effect of which is, that if the instrument operates as an agreement, and is made necessary by the Act, no stamp need be imposed upon it. Upon this instrument no agreement stamp ever could have been imposed. In this respect the case is distinguishable from *Morris v. Dixon*, because there the promise was to pay upon a contingency, and the instrument could not be valid as a promissory note. The result is, that where parties intend an instrument to operate solely as an acknowledgment to take a debt out of the Statute, they must be careful not to insert in it any terms which would make it a promissory note. I am of opinion that this instrument, being upon the face of it a promissory note, requires by law a promissory note stamp; and that it cannot be used for any purpose.

BOLLAND, B.—I have, very reluctantly, come to the same opinion; because it seems to me an extremely hard case, that where a party is willing to take a debt out of the Statute, such intention should be defeated by the insertion of terms, which have the effect of rendering the instrument a promissory note.

ALDERSON, B.—The Stamp Act, 31 *Geo.* 3, c. 25, s. 19, enacts, "That no promissory note shall be pleaded or given in evidence in any Court, or admitted in any Court to be good, useful, or available in law or equity, unless the same be duly stamped." If, then, this instrument be a promissory note, it not being stamped, cannot be received in evidence at all. It is to be regretted that there was not some provision in Lord *Tenterden's* Act to except promissory notes from a stamp, in cases like the present; it would have been a very useful clause.

Rule absolute.

LANCASTER v. WALSH.

An advertisement respecting a robbery of bank notes, promised "that whoever would give information by which the same might be traced, should, on conviction of the parties, receive a reward of 20*l.*": *Held*, that the word "information," meant the first information; and, therefore, though the plaintiff had given sufficient information, he was not entitled

ASSUMPSIT. The declaration stated, that the defendant, on the 29th of July, 1835, printed and published a certain advertisement, by which it was stated, that on *Saturday* night then last, two bank of *England* notes, one for 50*l.*, dated *June* 30th, and one of 30*l.*, dated *June* the 18th, and other monies, had been and were stolen from the person of the said defendant therein described, of *Halifax*, while on his way home; and that the said defendant did thereby then promise, that whoever would give information, by which the same might be traced, should, on conviction of the parties, receive 20*l.* reward, on application to the said defendant; and the said plaintiff, in fact, saith, that he, confiding in the said promise and undertaking of the said defendant, afterwards, to wit, on the day and year last aforesaid, did give information, by which the said notes and monies were traced, and did give information of, and discover and trace one *Benjamin Dyson* to the said defendant to be the party to the said offence, as in the said advertisement mentioned; and the said *Benjamin Dyson* afterwards, to wit, on the day and to recover, as it was not given until after other sufficient information had been received.

year aforesaid, was committed to prison to answer for the same offence; and afterwards, and at the general sessions of oyer and terminer, and general gaol delivery, holden for the county of *York*, on the 27th *February*, 1836, the said *Benjamin Dyson* was in due manner, and by due course of law, convicted of the said offence, of which said several premises the said defendant afterwards, to wit, on the day and year last aforesaid, had notice; and the said plaintiff did then apply to the said defendant for the said sum of 20*l.*, so being such reward as aforesaid, by means of which said premises the said defendant became liable to pay to the said plaintiff the said sum of 20*l.*, when the said defendant should be thereunto afterwards requested.

There were also counts for work and labour, and upon an account stated, to which the defendant pleaded *non assumpsit*.

The following were the pleas to the first count, and upon which issues were joined:—As to the first count, defendant says, that the plaintiff did not give information in manner and form as in the declaration mentioned. And for a further plea as to the first count, defendant says, that the notes and monies were not traced by the information so given by the plaintiff in manner and form as in the declaration mentioned. And for a further plea as to the first count, defendant says, that although the plaintiff did give the information in the first count mentioned, yet defendant says that another person, to wit, *James Illingworth*, together with the plaintiff, gave the said information; without this, that the plaintiff alone gave the said information in manner and form as in the first count alleged.

At the trial, before *Patteson, J.*, at the Summer Assizes for the county of *York*, it appeared, that on the 25th *July*, 1835, the defendant was robbed of 90*l.*, and in consequence inserted in the *Halifax Express* the following advertisement:—

“ Twenty Pounds Reward.

“ Whereas, on *Saturday* night last, two bank of *England* notes, one for 50*l.*, dated *June* 30, No. 19,994, and one for 30*l.*, dated *June* 18, No. 5,148, and other monies, were stolen from the person of Mr. *Richard Walsh*, of *Halifax*, on his way home; whoever will give information, by which the same may be traced, shall, on conviction of the parties, receive the above reward, on application to the said *Richard Walsh, Halifax*.—*July* 29, 1835.”

Upon the 1st *August*, 1835, *Brigg*, the deputy constable of *Bradford*, wrote to *Brierley*, the constable of *Halifax*, as follows: “ I have this morning got information of the person who robbed Mr. *Walsh*, and if the number of the notes can be got, I think it may be made out.” *Brigg* had received this information from a person of the name of *Clark*, to whom *Dyson* had confessed that he had committed the robbery. Previously to this communication by *Clark* to *Brigg*, *Illingworth*, the constable of *Wakefield*, had discovered that the notes had been cashed at the bank there, and had taken the parties who cashed them into custody. On the 6th *August* the plaintiff gave information that *Dyson*, on the night of the robbery, brought one of the notes to him, and that he was in possession of the number. At that time *Brigg* apprehended *Dyson*, who was brought to trial and convicted. The plaintiff claimed the reward, which was refused, on the ground that he had not given the first information, or that which led to the conviction. The learned judge

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left it to the jury to say, whether *Dyson* was apprehended and brought to justice by the information of *Clark* or of the plaintiff, and they found a general verdict for the defendant.

Alexander having obtained a rule to enter a verdict for the plaintiff on the first and third issues, and for judgment *non obstante veredicto*, on the second,

Creswell and *Addison* shewed cause.—The information upon which the reward was to be obtained, was to be information by which the notes were traced, and not by which they *might be* traced. As the plaintiff's information was clearly not the first, it must be contended on the other side that any person giving information at any time would be entitled to the reward, and thus it might be claimed by twenty different persons. The learned judge said, it was not sufficient to have given information by which the notes might be traced, but the notes must be actually found. It is immaterial when the plaintiff first had any knowledge of the matter, since he did not communicate it until after information had been given by others. It was left to the jury to say whether *Dyson* was apprehended and brought to justice by the information of *Clark* or of the plaintiff. It is averred in the declaration, that the plaintiff gave the information by which the notes were traced.—[*Alderson*, B.—The word "traced," imports that the plaintiff was the first person giving sufficient information; if any other person had previously done so, they were already traced.]—The information of the plaintiff was not such as the advertisement required. Where an advertisement, respecting a stolen child, promised to reward the person who would give information where the child was, so that it might be restored to its parents, and the plaintiff communicated to the defendant her suspicion where the child was, in order to put the matter into his hands for his benefit, if he chose to run the risk, and the child was afterwards restored to its parents by the exertions of the defendant acting upon the plaintiff's communication; it was held, that the plaintiff could not recover from the defendant, to whom the reward had been paid, either the whole or any portion of it, *Fallick v. Barber* (a). Secondly, the plaintiff is not entitled to judgment *non obstante veredicto* on the second plea; that plea traverses the allegation, that the plaintiff gave the information by which the notes were traced; that was a material averment; and the jury have found for the defendant.

Alexander and *W. H. Watson*, in support of the rule.—It is clear that *Walsh* received the information for the first time on the 5th August. The letter from *Briggs* was not within the terms of the hand-bill, nor could the offender be convicted upon it. That letter was not admissible in evidence, but *Briggs* himself should have been called.—[*Lord Abinger*, C. B.—Surely that letter is evidence that the information was previously received from *Briggs*.]—The first plea only denies the fact that the plaintiff had given information.—[*Parks*, B.—It denies such information as is meant in the hand-bill.]—The averment that the plaintiff did give information, by which the notes and monies were traced, means that he gave information that one *Dyce*—

was the party who had committed the offence.—[*Parke, B.*—If that be your view of the case, then the declaration is bad, for want of an averment that he gave the information by which the notes were traced.]—To entitle the plaintiff to the reward, it would be sufficient to prove that he gave information which shewed *Dyson* to be the robber. The third issue is open to the same objection as the first, it being quite clear that *Briggs* did give the information, and there being no averment that he alone gave it.

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LORD ABINGER, C. B.—The rule must be discharged. The “information by which the same may be traced,” means the first information by which the robber may be detected and punished. By the evidence, that seems to me to have been given by *Clark* to *Briggs*, and by him to *Brierley*, the plea must be understood in the same sense as the declaration, and means such a tracing as will bring the robber to detection. I am clearly of opinion that the letter from *Briggs* was admissible in evidence; it was the only means of proving what the communication was. That fixes the date of *Briggs*’ communication, which was the 1st *August*, whereas the plaintiff’s information was on the 4th. All that was wanted was information as to the party who had committed the robbery, and that was done by *Clark*’s information to *Briggs*.

PARKE, B.—I concur with the Lord Chief Baron, that the rule for entering a verdict for the plaintiff on the first and third issues, must be discharged; it is, therefore, immaterial to consider the application as to the second. The first and third pleas raise the same question, namely, whether the plaintiff was the person who gave the information mentioned in the declaration. If it had appeared that the plaintiff and another gave the information at the same time, then the plaintiff could not have been alone entitled to the reward. Upon looking to the hand-bill, and to the heading of it, it is clear that the defendant only intended to offer one reward. It means the giving such information as shall trace out the offender, and also procure his conviction. The plaintiff must shew that he gave the information which traced the notes to *Dyson*, and procured his conviction; for it is clear that the first person who has so done is alone to have the money. I think the learned judge was right in saying that the plaintiff was not the first person. It appears that the first information was given by *Clark*, who had heard a confession from the offender himself, that he had sold a 5*l.* note and a 30*l.* note. That was good evidence to go to the jury of a communication to the plaintiff; and the question is, whether that was the first communication, within the meaning of the hand-bill. For though there was no proof that *Clark* gave the information to the plaintiff, yet as he informed the constable, I think it was not necessary to go further, and shew that he informed the defendant.

BOLLAND, B.—I think it was properly left to the jury to say, whether the plaintiff gave the first information. As to the question, whether the letter was properly received in evidence, I have no doubt whatever, and perfectly concur in what has been said. *Brierley* being asked whether he could state the time when he received the first information from *Briggs*, answered, No; but on the letter being put into his hands, he said, he had no doubt that it was before the 1st *August*.

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ALDERSON, B.—The term “first information,” is a tautologous expression. The word “information,” used in the declaration, must mean, “first information.” It is perfectly clear, that unless it is used in that sense in the hand-bill, there is no meaning in it. The true construction is, the first person who shall communicate such facts as will lead to the conviction of the offender. I concur in the opinion, that a communication to an authorized person, such as a constable, must be considered as a communication to the defendant.

Rule discharged.

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An information in the nature of the popular action of debt, cannot be maintained for arrears of assessed taxes, inasmuch as the 5 & 6 Will. 4, c. 20, s. 13, provides that the amount shall be recoverable “as a debt upon record.” The proper proceeding is by *scire facias*, extent, or by information on the record itself.

INFORMATION by the Attorney General against the defendant, to recover certain arrears of assessed taxes. The first count stated that the defendant was indebted to his Majesty in the sum of 80*l.*, for that before and at the time of the making the assessment in that count mentioned, to wit, on the 6th April, 1834, at the Parish of *St. George, Hanover Square*, in the county of *Middlesex*, to wit, at *Westminster*, the defendant was a person chargeable to certain duties of assessed taxes, payable to his Majesty, by virtue of the Statutes in that case made and provided, and that being so chargeable, afterwards, to wit, at *Westminster* aforesaid, he was in due manner according to the form of the Statute, &c., assessed for the said duties in the sum of 40*l.*, for the year ending 5th *April*, 1835, whereof he had notice; and that afterwards, to wit, &c., a certain warrant for collecting and levying the said duties was, in due manner, issued out and delivered to a certain collector of the said duties for the said parish. And the Attorney General further says, that the said sum of money, being the amount of the said duties assessed as aforesaid on the defendant, has not been, nor could, or can be levied or collected under or by virtue of the said warrant, and that the same and every part thereof still remains and is due, and in arrear, and unpaid to his Majesty, and that the defendant still owes the same, and every part thereof, to his Majesty, whereby an action hath accrued to his Majesty to demand the said sum of 40*l.* The second count was the same as the first, except that the arrears sought to be recovered were for the year ending the 5th *April*, 1836. *Plea*, the general issue.

At the trial, before Lord Abinger, C. B., at the *Middlesex* Sitzings after *Hilary Term*, 1837, the only evidence on the part of the Crown was the production from the head office of the Commissioners of Stamps and Taxes, of the schedule of defaulters for assessed taxes, made pursuant to the 43 *Geo.* 3, c. 99, s. 45 (a); from which it appeared that the defendant was a defaulter

(a) And be it further enacted, That the collectors appointed as aforesaid, shall make a due return, fairly written on paper, under their hands, to such commissioners, containing the names, surnames, and places of abode of every person within their respective collections, from whom such collector or col-

lectors shall not have been able to collect or receive such duties, for any of the causes before mentioned, and which shall have been duly verified on the oath of such collector as aforesaid, and the particular reason for returning each defaulter, and the sum and sums charged upon every such person; and such commis-

in those two years to the amount of 59*l.* 7*s.* 6*d.* It was contended, on the part of the Crown, that by the 5 & 6 *W.* 4, c. 20, s. 13, such schedule was conclusive evidence against the defendant of the sums mentioned therein being due to the Crown. For the defendant, it was objected that this information could not be supported, inasmuch as the latter part of the 13th section declared this to be a debt upon record, on which no personal information, in the nature of an action of debt, could be founded, and that the proper mode of proceeding was by writ of *scire facias*, which would give the party an opportunity of putting a defence upon the record. The Lord Chief Baron was inclined to think the objection valid; and a verdict was entered for the Crown, with liberty for the defendant to move to enter a verdict for him.

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Price having, in *Easter Term*, 1837, obtained a rule *nisi*, accordingly,

The *Solicitor General* and *Amos*, in *Trinity Term*, shewed cause.—The case turns upon the construction to be put upon the Statutes relating to the assessed taxes, viz. the 43 *Geo.* 3, c. 99; the 43 *Geo.* 3, c. 161; and the 5 & 6 *W.* 4, c. 20; and the question is, whether the crown can proceed upon this information, which is in the nature of a popular action of debt, when the Act of Parliament declares it to be a debt upon record.—[Lord Abinger, C. B.—Formerly the schedule was a record of *Exchequer*, but the 13th section of the 5 & 6 *W.* 4, c. 20, requires that it should be deposited and remain in the head office of the Commissioners of Stamps and Taxes, and be a record there.]—Notwithstanding that section, it is submitted that the crown may proceed to recover this debt by the ordinary mode. By the 43 *Geo.* 3, c. 99, s. 9, the commissioners for executing the Act who are not the officers of the crown are to meet annually, and appoint assessors of the duties of the different parishes and places, who, upon a certain day, are to bring in their certificates

sioners, after due examination thereof on the oaths or affirmations as aforesaid of the collectors, shall ascertain the sums which, according to the provisions of any of the said Acts herein mentioned, shall have been discharged from assessment for any cause therein specially allowed; and the said commissioners shall also make out their schedules, containing the sums so discharged, and the sums with which each and every such defaulter ought to be charged, and the sums which shall not have been collected by occasion of the collector's neglect, and which ought to be re-assessed on the parish, ward, or place, as aforesaid, and shall cause the said several particulars to be inserted in a schedule, fairly written on parchment, under the hands and seals of such commissioners, or any two or more of them, containing the names and surnames of the said collectors, and the same to be delivered to the receiver general, to be returned by such receiver general into his Majesty's said Court of *Exchequer*, whereupon every person so making default of payment, and each

parish, ward, or place so in default, may be charged by process of Court, according to the course thereof in that behalf; and in default of such schedule made out according to the directions of this Act, it shall be lawful for the receiver general and he is hereby required to return every such parish, ward, or place, *insuper* for all sums not paid to the receiver general, and contained in the duplicate of assessment to him delivered, and all such sums so returned shall, in such case, be re-assessed on such parish, ward, or place, and all and every the proper officers therein concerned shall, and they are hereby required to take care, from time to time, that such process be duly issued and made effectual, so that all such sums as shall be in arrear and unpaid as aforesaid, may be speedily recovered and paid into his Majesty's *Exchequer*; and if any such collector shall neglect or refuse to make such return, in manner before directed, every such collector shall forfeit the sum of one hundred pounds.

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of assessment in writing, verified upon their oaths; and at the same time they are to return the names of two persons to be collectors. By the 12th section, the assessments delivered in by the assessors shall be signed by the commissioners, and they shall also sign three copies of the assessments, and deliver them to the collectors, with warrants under the hands of the commissioners for collecting the same, upon which the collectors are to make demand of the sums charged upon the respective parties at their last place of abode, and upon payment, to give acquittances, which shall be perfect discharges. Then the 20th section provides that the crown shall appoint inspectors and surveyors. Section 24 gives a power of appeal in cases of surcharge to commissioners; and by section 29 their decision is to be final. The 33d section gives the collectors a power of distraining, upon non-payment of the duties, and of selling, and in certain cases of imprisoning the parties making default. The 44th and 45th sections regulate the proceedings in case the collectors cannot obtain the money. Then the 43 *Geo.* 3, c. 161, makes further provisions. The 23d section (b), directs that such duties as cannot be collected may be recoverable as a debt upon record to the King's Majesty, his heirs and successors. In the present case the whole proceedings were conformable to these Acts; the assessments were made and delivered to the collectors, and a schedule of defaulters made and returned to the commissioners, who made a copy of it, and returned it to the receiver general, by whom it was transmitted to the Court of *Exchequer*. That continued to be the course until the 5 & 6 *W.* 4, c. 20, s. 13, by which it is enacted that all such schedules as aforesaid, which shall be made out at any time after the commencement of this Act, shall be delivered over or transmitted by the receiver general, receiving inspector, or other receiver, to whom the same shall have been delivered, to the Commissioners of Stamps and Taxes, and shall be deposited and remain in the head office of the last-mentioned commissioners; and the production of any schedule so deposited, and purporting to contain the name or names of any such defaulter or defaulters as aforesaid, shall be conclusive against any person named therein, as making default of payment; and

(b) And be it further enacted, That every assessment to be made of the said duties in pursuance of this Act, in *England, Wales, and Berwick-upon-Tweed*, shall be in force for one whole year, commencing from the fifth day of *April* in the year in which the same shall be made, and ending on the fifth day or *April* then next following; and the said several duties shall be paid by quarterly instalments, on the days hereinafter mentioned (that is to say), on the twentieth day of *June*, for the quarter commencing from the fifth day of *April*, and ending on the fifth day of *July*; the twentieth day of *September*, for the quarter commencing from the fifth day of *July*, and ending on the tenth day of *October*; and the twentieth day of *December*, for the quarter commencing from the tenth day of *October*, and ending on the fifth day of *January*; and the twentieth day of *March*, for the quarter commencing on

the fifth day of *January*, and ending on the fifth day of *April*, in every year, the first payment thereof to be made on the twentieth day of *June*, one thousand eight hundred and four; and it shall be lawful for the respective commissioners, or any two or more of them, and they are hereby required, as soon as the assessment shall be made, to issue out and deliver to the respective collectors their warrants for the speedy and effectual levying and collecting the said duties, as the same shall become payable, by quarterly instalments as aforesaid; and such part thereof as cannot be so levied and collected may be recoverable as a debt upon record to the King's Majesty, his heirs and successors, with full costs of suit, and all charges attending the same, and when so recovered, the duties shall be paid to the receiver general in aid of the parish or place answerable for the same.

against every parish, ward, or place named therein as in default of the sum or sums mentioned in any such schedule being due and owing, and in arrear and unpaid to his Majesty, his heirs and successors, unless payment thereof shall be proved; and every such sum shall be recoverable from the person or persons making default of payment thereof, as a debt upon record to the King's Majesty his heirs and successors with full costs of suit and all charges attending the same." It is contended on the other side, that if the proceedings had been by *scire facias*, the defendant would have been let in to give evidence that the debt was not due; but, it is submitted that it is not so; for the only question in that case would have been, whether there was a record or not. The Statute does not mean that that proceeding must be upon the schedule, as if it were a record, but only that the production of the parchment should be conclusive evidence, as in debt on a record.—[Lord Abinger, C. B.—It is very probable that the persons who drew these clauses had not any very accurate knowledge of the forms of action.]—It is true that the crown might have proceeded by *scire facias*, or extent, but in neither way could the merits of the case have been gone into.—[Lord Abinger, C. B.—The 43 Geo. 3, c. 161, s. 23, requires the commissioner to issue their warrant to the collector, and such part as cannot be collected may be recoverable as a debt on record to the King; therefore the record was a record of this Court.]—Then, the subsequent Act says, it shall be lodged with the commissioners, and not in this Court. If it were a record, there was no occasion to say that it should be conclusive evidence. Supposing *scire facias* were brought, it would be necessary first to lodge the record in this Court.—[Alderson, B.—Should you not have filed the schedule in this Court, in order to proceed upon it.]—The crown does not treat it as a debt of record.

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Price, contra.—The question depends upon the nature of the debt, and the nature of the proceeding, to recover the duties given to the crown. A debt on record to the King means a crown judgment, upon which nothing further can be done.—[Lord Abinger, C. B.—A debt of record is not necessarily a judgment; for instance, a person may come and acknowledge a recognizance.]—It is true that a bond to the King is only matter *quasi* of record; but this is more than a bond debt; it is a debt enrolled, though instead of being in the King's Remembrancer's Office, the Act requires it to be lodged in the Head Commissioners Office of Stamps and Taxes.—[Alderson, B.—Then, you contend that the Commissioners of Stamps and Taxes are now officers of the Court of *Exchequer*.]—Unquestionably, every person concerned in the collection of the King's revenue is an officer of this Court, and under its control. The crown has a particular process for the recovery of its debts, from which it cannot deviate. The main object of the crown's proceedings, is not only safety from damage or loss, but expedition in recovering its debts. By this mode of proceeding the debt is delayed, and the expence increased. The Statute only makes the schedule evidence of non-payment, and not evidence of the debt. Much useful information, as to the nature of the debt, is to be found in Chief Baron Gilbert's *Treatise on the Court of Exchequer*. It is there said (c). "Towards the time of H. 7 and H. 8, as the revenue increased, and merchants were obliged to make payments, the customers and collectors received

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bonds from the parties to the King. These collectors were no more than bailiffs or receivers, and not as justices between the King and the party; and therefore the acknowledgments before them were not in the Court of record. And there was, before 33 *H.* 8, 39, this difference between them and bonds of record, that these were immediately levied by the *levari*; but those debts not of record, could not be levied by the *levari*, but a *scire facias* was to issue thereupon; and the reason of the difference is, that where an obligation is acknowledged in a Court of record, such recognizance is the same as a judgment; the conusor is personally present, and the Court is supposed to know him as much as a defendant, against whom they give judgment. And hence it is that the *levari* issues, and all the other prerogative process; and that debt cannot be discharged until there be a receipt upon record. But where the King's ministerial officer takes an obligation to the King, such obligation is not of record; and when the officer delivers such obligation into Court, the time of delivery is recorded; so that if that obligation be just, and the conusor has nothing to say against it, nobody can controvert the time of its lien, because the delivery is of record, and therefore it ought to bind from that time; but the obligation is no more than a warrant of attorney for the ministerial or other person to deliver it of record, for being an act in *pais*, and not of record, the conusor may come in at the return of the *scire facias* and traverse the obligation; but in this it differs from a warrant of attorney; for if a man forge a bond and warrant of attorney, and then confess judgment, the defendant can never deny the deed if a *scire facias* issued after a year and a day; but in this case there is no judgment upon the bond, for the bond is only delivered of record, and therefore the judgment upon the bond arises only on the *scire facias*; and therefore, in *Ireland* they often take a warrant of attorney to confess judgment, upon such bond in an action of debt; and when such judgment is entered, it is a matter of record, and cannot be discharged but by an act of equal notoriety." It is difficult to understand what is meant by the schedule being conclusive evidence. The words "conclusive evidence," would imply that it is not necessary to go into any evidence at all. To proceed by information, is to make that matter in *pais*, which is already matter of record. For debts in *feri* an information is the proper course (*d*); but where they are actually of record, a *levari* may at once issue; and a debt, recoverable as a debt of record, is, in other words, leviable by the sheriff. The nature of this proceeding is fully treated of in *Price's Exchequer Practice* (*e*), from which it appears, that "such process, notwithstanding it is, in its form and general force and effect, final, and in the nature of an execution, might be pleaded to on this side of the Court, both in bar or denial, and in discharge of the debt, or charge upon the roll against the party who was the object of the proceeding." *Blackstone* and other writers put the revenue of taxes upon the ground of ancient duties to the crown, which were leviable without any proceeding at all. It is therefore clear that this is a defined and settled debt, upon which the great privilege of the Court of *Exchequer* ought to be executed "for its speedy levy and for the soonest satisfaction of the King's debt.—[*Alderson*, B.—The second rule of the 48 *Geo.* 3, c. 141, (class V.) says, "That every such schedule, being certified under the hand of the receiver general, or his deputy, of the

county or division where the said arrears accrued to the Court of *Exchequer*, at *Westminster*, shall be received and taken as sufficient evidence of a debt due to his Majesty, and shall be a sufficient authority to his Barons of the said Court, or any one of them, to cause process to be issued against such defaulters named in the said schedule, to levy the whole sum in arrear and unpaid by such defaulters; and the sheriff or other officer to whom the said process shall be directed, shall, without delay, cause the whole sum in arrear to be levied." Therefore, upon the schedule being returned, there is an express power to issue a *levari facias*.]—The word "process," is used throughout. An information cannot be said to be process, which shews that the present proceeding is incorrect.—[Lord *Abinger*, C. B.—It is true, that where the debt is of record, the proper process for recovering it is by *levari facias*, to which the party may plead all equitable matters, or he may apply by motion, which is the more ordinary practice, to remove the hands of the sheriff, and let in the equitable claim; but the question which arises here is whether, upon the construction of the Act, the crown may not proceed either by summary process or by information.—*Alderson*, B.—The Statute says, the schedule shall be conclusive evidence of the debt due and owing from the person named therein. The party might shew that he was not the person named therein.]—By the 33d section of the 43 *Geo.* 3, c. 99, a power of distress is given where payment has been refused. By the 35th section, when persons remove without paying their taxes, that fact is to be certified to the commissioners of the place where the party can be found, which commissioners are to cause the amount to be levied and paid to the collector of the parish where the assessment was made. By the 41st section, collectors refusing to attend commissioners with their assessments, are to forfeit 50*l.*; and if there is money in the hands of the collectors which cannot be recovered under the hand of the commissioners, or the commissioners shall neglect to issue such warrant, the amount shall be recoverable as a debt on record. That clause shews that an express distinction is taken between debts recoverable as matters of record, and those recoverable by information. In the 45th section, a distinction is taken between a person and the parish; and it makes express provision that all sums in arrear shall be speedily recovered. The 47th section requires, "that where there has been a failure in assessing the duties, or returning the duplicates, the receiver general shall certify the same to the Barons of the *Exchequer*, with the names of the commissioners, assessors, &c., who shall be respectively liable to process from time to time by writ of *distringas*." Then comes the 5 & 6 *W.* 4, by the 13th section of which, the head office of the Commissioners of Stamps and Taxes is made an office of the Court by requiring the schedule, which was formerly delivered here, to be lodged in that office.—[Lord *Abinger*, C. B.—You contend that it was the intention of the legislature to give a document, not in Court, the same force and effect as formerly, when it was brought into Court.]—The latter part of the 13th section says, that "the schedule shall be conclusive evidence against any person named therein, &c., and against every parish, &c. and every such sum shall be recoverable as a debt upon record, with full costs of suit and all charges attending the same." The making it a record is the foundation for the immediate and speedy process, which throughout the whole of the Act, the officers of the Court are peremptorily required to adopt. It is submitted, that the construction contended for is in aid, rather than in

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derogation of the right of the crown; and that the proceeding by information is not only repugnant to a sound construction of the Act, but also at variance with the recognized practice of the revenue laws.

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The *Solicitor General* replied.—[Lord Abinger, C. B.—Let me call your attention to this view of the question. There are two cases provided for by the Statute, one of an individual, and another of the parish. Both are embraced in the 13th section of the 5 & 6 Will. 4, c. 20, and both schedules are to be deposited with the Commissioners of Stamps. Now, suppose this had been the case of a parish in default, what process would you have taken under the Act?—The crown would have proceeded against the parish in the same mode as before the passing of the Act, and the production of the schedule would be conclusive evidence.—[Lord Abinger, C. B.—Then you must have applied to the Court, or a judge, and have produced the schedule, and have shewn by affidavit that it was duly deposited with the commissioners, and then have applied for a *distringas* against the parish. As you must do that in one case why should you not in the other?—It is not said that such a proceeding might not be taken against an individual, but it is submitted that there is nothing to prevent the crown from adopting the present mode of proceeding.—[Lord Abinger, C. B.—There can be no reason why the crown should abandon the summary process of a *levari facias*, and go through the form of an information and trial.]—There is little doubt that the words “recoverable as a debt upon record,” were copied from the old act without considering the effect of them.

Cur. adv. vult.

LORD ABINGER, C. B., now delivered the judgment of the Court.—This was an information filed by the crown, not purporting to be filed upon any document or any record, but stating, that the defendant had been assessed in certain taxes, and that a warrant had issued against him, signed by the commissioners, but that the sum had not been, nor could be, collected under it; and that the same remained due and in arrear and unpaid, whereby an action hath accrued, &c. The information was supported at the trial by the production of the assessment itself from the tax-office, in which the party appeared as in arrear for the sum sought to be recovered. It was contended on the part of the crown, that by the 5 & 6 W. 4, c. 20, s. 13, this assessment was made conclusive evidence; but on the other hand, it was objected by Mr. Price, that the same section made the debt recoverable as a debt of record which could only be recovered by *scire facias*, extent, or by filing an information upon the record itself. My impression originally at the trial was, that the objection must prevail: we have taken time to consider it, and have come to the conclusion, with some reluctance, that the objection must succeed, and that a verdict ought to be entered for the defendant. It is very remarkable, that by this Act of Parliament the assessments, which used to be returned into this Court, are now returned to the office of commissioners of taxes, and are to be kept there, and yet the person who is in arrear is made liable to pay the arrear as a debt upon record. The document which is made returnable by the Act of Parliament, is kept by the commissioners in *Somerset-house*; and though, doubtless the object of the Act was very laudable and correct, it is unfortunate that the words, “shall be recoverable as a debt

upon record," were used. We know of no means to recover it as a debt upon record but by *scire facias*, or extent, or filing an information upon the record itself. Here there is nothing stated, but that there was an assessment and a warrant.

Rule absolute.

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TRESPASS for breaking and entering the plaintiff's close, with horses, carts, and other carriages. *Pleas*: *first*, not guilty; *second*, that the defendant was the occupier of a certain close, and that all the occupiers of that close had actually as of right, used and enjoyed, without interruption, for the full period of twenty years, the liberty of going, returning, &c. on foot and with horses, carts, and other carriages, over the said close, in which, &c. The *third* plea was similar to the second, except that it stated an user of forty years. The replication traversed the second and third pleas. At the trial, before *Coleridge, J.*, at the *Liverpool* Spring Assizes, 1838, it appeared in evidence that a right of way over the plaintiff's close for horses, carts, and carriages, had existed from time immemorial, and that the road had been used for all agricultural purposes by the occupiers of the farm, to which it led. It was also proved that no coals had ever been conveyed along the road except on one occasion, about seventy years ago, when an attempt was made to convey them, but was frustrated by the then owner of the plaintiff's close. The jury were not required by the learned judge to say whether the road had been used for all manner of purposes, or had been confined to agricultural purposes only; but they found a general verdict for the plaintiff. The judge stated, in his report, that he considered it to have been proved that the road had been used for agricultural purposes only; and he further stated, that he gave the defendant leave to move to enter a verdict, if the Court should be of opinion that such evidence supported the plea which declared the road to have been used for all purposes.

Alexander having obtained a rule to enter a verdict, or for a new trial,

Cresswell, Starkie, and *J. S. Wortley* shewed cause.—It was proved at the trial that the road in question had been used by carts and carriages for agricultural purposes only; that it had never, within the last forty years been used for the conveyance of coals, and that as long as seventy years ago, parties had been prevented from conveying coals upon it. The defendant, however, contended that proof of user for agricultural purposes established his right to use the way generally, and that without a new assignment the plaintiff was not entitled to shew that the way had not been used for carrying coals.—[*Lord Abinger, C. B.*—Now could the question of new assignment arise, unless the right to carry coals had been first raised on the record?—Proof of a right to use a road for farming purposes does not support a plea, that claims a right to use it for all purposes, *Ballard v. Dyson* (a).—

Where the plaintiff declares in trespass against the defendant for breaking and entering his close with horses and carriages, and the defendant pleads a general right of way over the close for horses and carriages, the plaintiff may shew, without a new assignment, that the defendant is not entitled to convey "coals" along the close in question.

It is not a proposition of law, that a party who proves his right to use a road for many purposes, is entitled to use it for all purposes; but the extent to which he has used it, is a fact from which the jury may infer a general or a limited right of user.

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[*Parke, B.*—Can the use of the road be confined to those purposes merely for which it was originally granted? If it can, suppose a road to have been used merely to convey the grass from pasture land, if that land is afterwards rendered arable, would it not follow that a party would have no right to carry away the corn. It seems a consequence of the plaintiff's argument, that the agricultural purposes themselves might be limited.]—That question may be answered by another. Suppose a man receives a grant of right of way to his farm, could he build a square upon that farm and give all the inhabitants a right of way to their houses? *Rex v. Lyon (b)*, and *The Marquis of Stafford v. Coyney (c)*, shew that the use of a road may be restricted to certain carriages only. *Rex v. The Marquis of Buckingham (d)*, and *Howell v. King (e)*, prove that a right of way may be limited in other respects. *Jackson v. Stacey (f)* establishes that a right to use a road for the purposes of agriculture, is not a general and unqualified right. *Drewell v. Towler (g)*, and *Bower v. Hill (h)*, are in point. It was proved that coals were never carried along the way in question. A party who claims by prescription ought to substantiate his claim in the precise terms in which he makes it. *Pring v. Henley, Bull. Ni. Pr. 59*. They also cited *Reignolds v. Edwards (i)*, *Morewood v. Wood (j)*, *Rogers v. Allen (k)*, *Ballard v. Harrison (l)*, 2 Saund. 175, b.; *Richetts v. Salwey (m)*, *Taylor v. Whitehead (n)*. 1 Ro Abr. 391; *Bright v. Walker (o)*, *Monmouth Canal Company v. Harford (p)*, Com. Dig. "Chemin," D. 2; *Trickey v. Yeandall (q)*.

Alexander and Wightman, contrd.—The defendant's plea, together with the evidence offered at the trial, disposes of all the cases cited by the plaintiff. The plea claims an extensive and unqualified right of way, and the evidence shewed an absence of all interruption of the user of the way. The plaintiff assumes that the road in question was used for agricultural purposes only, but the evidence negatives that assumption, and the jury were never required to say whether it was an agricultural road or not.—[*Parke, B.*—Ought you not to have asked the judge to submit that question to the jury?—When an uninterrupted user for every description of vehicle was proved, the defendant was entitled to the verdict. The circumstance of the jury not having found this road to be an agricultural one, distinguishes this case from *Jackson v. Stacey*, *Ballard v. Dyson*, and *Rex v. Lyon*. According to the argument of the plaintiff, it was incumbent on the defendant to shew a specific carrying of coals along the road in question. But if a right to convey certain articles along a road could be established only by shewing those articles to have been conveyed on some former occasion, no right of way could ever be proved.—[*Lord Abinger, C. B.*—The jury would have to infer whether the road had been used for all purposes, or only for certain articles; but accord-

- (b) Ry. & Moo. 151; 5 D. & Ry. 497.
- (c) 7 B. & Cr. 257.
- (d) 4 Campb. 189.
- (e) 1 Mod. 191.
- (f) Holt, N. P. C. 455.
- (g) 3 B. & Adol. 735.
- (h) 2 Bing. N. C. 339; 1 Hodges, 334; 1 Scott, 526.
- (i) Willes, 282.
- (j) 4 T. Rep. 157.

- (k) 1 Camp. 309.
- (l) 4 M. & Sel. 387.
- (m) 2 B. & Ald. 360.
- (n) Doug. 716.
- (o) 1 Cr., M. & Ros. 211; 4 Tyrw. 502.
- (p) 1 Cr., M. & Ros. 614; 5 Tyrw. 68.
- (q) 2 Bing. 26; 9 B. Moore, 55.

ing to your argument, if you had stated in your plea a prescription to carry coals, that prescription would have been fully proved by the evidence offered at the trial.]—The defendant did not desire to use the road for the purpose of carrying coals. If the argument of the plaintiff is correct, the whole question depends upon the *contents* of the carts; but a right of way for carriages was never made to depend upon the description of articles with which the carriages are loaded.—[*Parke, B.*—You might have insisted upon taking the opinion of the jury whether the right of way was limited to agricultural purposes or not.]

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LORD ABINGER, C. B.—We cannot lay it down as a legal proposition, that where a party proves his right to use a road for many purposes, the law gives him a title to use it for all purposes. The jury are always at liberty to infer a greater or less extent of the right of user; and there must be a new trial in this case to give them an opportunity of saying, whether the right of way was limited or general. We give no opinion as to the inference that they may form upon the subject.

PARKE, B.—It is clear that the defendant is not entitled to succeed on the ground of its being the duty of the plaintiff to new assign. The plea states, that the defendant is entitled to use a certain way; he is, therefore, bound to prove, not only that he has enjoyed that way, but that he has enjoyed it as of right, for a certain period; and undoubtedly, an user for all purposes is evidence of his being so entitled. If he used the road whenever he had occasion, that would be evidence from which the jury might infer that he was entitled to use it for all purposes. They would be justified in drawing such an inference, if they thought proper to do so. The user, therefore, is always to be left to the jury; and if it were confined to one purpose, we may conclude that they would not think a general right of way had been established. The rule for a new trial must be made absolute, on payment of costs.

BOLLAND, B., concurred.

Rule absolute, on payment of costs.

M'DONALD v. JOPLING.

ASSUMPSIT to recover the sum of 16*l.* 17*s.* 8*d.*, due for seaman's wages. To an action brought to recover the sum of 16*l.* 17*s.* 8*d.* for seaman's wages, the defendant pleaded that the service of the plaintiff was performed under an agreement made in pursuance of 5 & 6 W. 4, c. 19, whereby the plaintiff agreed that he would serve on board the ship *C.*, from the port of *London* to *C.*, and back to a port of delivery in the United Kingdom; that afterwards, and before the period for which the plaintiff agreed to serve, was completed, and after the said ship's arrival at her port of delivery, and before her cargo had been discharged, to wit, at the port of *Liverpool*, the plaintiff did wilfully and without the leave and permission of the defendant or the master, or other person in command, absolutely desert the said ship, whereby, and according to the said Statute, he the said plaintiff forfeited to the defendant, the owner of the said ship, his said wages or salary. The replication traversed the absolute desertion. The question being, whether the entire wages, or only a month's wages were forfeited.

Held, that that question was on the record. *Held* also, that a seaman who, after the arrival of a ship at her port of discharge, but before her discharge, quits her and does not return, does not forfeit all, but only a month's wages.

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was performed under an agreement in writing, made in pursuance of the 5 & 6 W. 4, c. 19, whereby it was, amongst other things, agreed by the plaintiff that he would serve on board the ship *Chrystal*, in a voyage from the port of *London* to *Cardiff*, ports of *Sicily*, and back to a port of delivery in the United Kingdom; and that he would be obedient to the lawful command of the master of the said ship in every thing relating to the said ship, and the materials, stores, and cargo thereof, whether on board such ship, in boats, or on shore; and that he the said plaintiff would not, on any account or pretence whatever, go out of or quit the said ship, by day or night, without leave being first obtained from the said master. That the plaintiff agreed to serve on board the said ship in the capacity of a mate, at the wages of 5*l.* for each month. That afterwards, and before the period for which the plaintiff agreed to serve was completed, and after the said ship's arrival at her port of delivery, and before her cargo had been discharged, to wit, at the port of *Liverpool*, the plaintiff did wilfully, and without the leave and permission of the defendant or the said master, or other person in command of the said ship, and without any previous discharge, absolutely desert the said ship to which he so belonged as aforesaid; and the said desertion was then treated by the said master of the said ship as an absolute desertion, whereby, and according to the said Statute, he the said plaintiff then forfeited to the defendant, the owner of the said ship, his said wages or salary, to which he might otherwise have been entitled.

Replication to the second plea, that the plaintiff did not absolutely desert the ship, in manner and form, &c.

It appeared in evidence, that the ship *Chrystal* arrived at *Liverpool*, her port of delivery, on the 2d *February*, 1837; that the plaintiff having previously applied to the master for his discharge, which was refused, left the ship on the 4th *February*, without the leave of the defendant or the master, and never returned; that the cargo of the said vessel was not delivered until the 18th *February*; that the delivery of the cargo belongs exclusively to the mate, and that his services are in great requisition during the delivery; and that in the present case, the master suffered considerable inconvenience in consequence of the plaintiff's absence.

At the trial before *Coleridge, J.*, at the Spring Assizes for *Northumberland*, 1838, the jury found a verdict for the defendant. The learned judge gave the plaintiff leave to move to enter a verdict for 1*l.* 17*s.* 8*d.*, if the Court should be of opinion that the plaintiff, by quitting the ship, had forfeited no more than a month's pay. *Temple* having, in *Easter Term*, obtained a rule to shew cause why a verdict for the above sum should not be entered for the plaintiff,

W. H. Watson now shewed cause.—The plaintiff cannot move to enter a verdict, as the question arises on the record. The motion ought to have been for judgment *non obstante veredicto*. By the 5 & 6 W. 4, c. 19, s. 9 (a),

(a) The 9th section is to the following effect:—"And be it further enacted, That every seaman who shall absolutely desert the ship to which he shall belong shall forfeit to the owner or master thereof, all his clothes and effects which

he may leave on board, and all wages and emoluments to which he might otherwise be entitled, provided the circumstances attending such desertion be entered in the log-book at the time, and certified by the signature of the master

a mariner deserting his vessel incurs a forfeiture of his entire wages. The act of quitting the ship amounted to an absolute desertion, because it took place before the delivery of the cargo, or, in other words, before the contract was at an end. Now, it is plain that the contract lasts until the delivery of the cargo; for the 11th section (b), of the Statute, enacts that the wages need not be paid until three days after the cargo has been delivered.—[Lord Abinger, C. B.—By the 7th section (c), certain penalties are imposed on mariners *quitting the ship*, but the case of *absolute desertion* is provided for by 19th section, and heavier penalties are annexed to it; that shews that the Statute considers a quitting, and a deserting of the ship, to be different offences.]—The 9th section enacts, that “an absence of a seaman from the ship for any period, however short, under circumstances plainly showing that it was his intention not to return thereto, shall be deemed an absolute desertion.” It is plain, from the circumstances of this case, that the plaintiff had no intention of returning. An absence from the ship, during the existence of the contract, amounts to an absolute desertion. The case of *Frontine v. Frost* (d), which will be cited on the other side, does not apply; because it was decided under the 2 Geo. 2, c. 36. At common law, the contract between the master and mariner was not ended until the delivery of the cargo. Here the plaintiff by abandoning his contract, has precluded himself from recovering under it. The present case is analogous to that of servants hired by the year, who cannot recover a quarter’s wages, if they quit in the middle of the quarter. It is reasonable that a mate shall not quit the ship before her discharge, because his services are particularly required at that time. The case of *The Pearl, 1 Denton* (e), is in point. It is laid down in *Abbott on Shipping*, p. 463, that “desertion from the ship is held to be a forfeiture of the wages previously

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and mate, or other credible witness; and that an absence of a seaman from the ship for any time within the space of twenty-four hours immediately preceding the sailing of the ship, without permission from the master thereof, or for any period, however short, under circumstances plainly showing that it was his intention not to return thereto, shall be deemed an absolute desertion.”

(b) “And if the ship shall be employed in trading otherwise than coastwise, then the wages shall be paid, at the latest, within three days after the cargo shall have been delivered, or within ten days after the seaman’s discharge, whichever shall first happen.”

(c) The 7th section is as follows:—“And be it further enacted, That if any seaman, after having signed such agreement as aforesaid, or after the ship, on board which he shall have agreed to serve, shall have left her first port of clearance, and before the period for which he shall have agreed to serve shall be completed, shall wilfully, and without leave, absent himself from the ship, or otherwise from his duty, he shall (in all cases not of absolute desertion, or not

treated as such by the master) forfeit out of his wages to the master or owner of such ship, the amount of two day’s pay for every twenty-four hours of such absence, and in a like proportion for any less period of time, or, at the option of the said master, the amount of such expenses as shall have been necessarily incurred in hiring a substitute to perform his work; and in case any seaman while he shall belong to the ship shall, without sufficient cause, neglect to perform such his duty as shall be reasonably required of him by the master, or other person in command of the ship, he shall be subject to a like forfeiture in respect of every such offence, and of every twenty-four hours’ continuance thereof; and in case any such seaman, after having signed such agreement, or after the ship’s arrival at her port of delivery, and before her cargo shall be discharged, shall quit the ship without a previous discharge or leave from the master thereof, he shall forfeit to the master or owner one month’s pay out of his wages.”

(d) 3 Bos. & Pul. 302.

(e) 5 Rob. Admir. Rep. 224.

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earned, in all maritime states." The Statute 5 & 6 Will. 4, c. 19, does not abrogate the common and maritime law. Here there has been an absolute desertion, which works a forfeiture of wages.

Temple, contrd.—The plaintiff was not in a condition to move in arrest of judgment, because the defendant had not put on the record, the facts necessary to enable him to demur. The defendant has not stated in his plea, that the quitting of the ship took place after the completion of the voyage, nor has he stated in the words of the Statute, that the plaintiff had no intention of returning. The latter was therefore obliged to traverse the *absolute desertion*.

This is not an absolute desertion under the 9th section, by which the entire wages are forfeited; but merely a total quitting of the ship, before the delivery of the cargo, which entails a forfeiture of a month's wages. The Statute 5 & 6 Will. 4, c. 19, contemplates three cases: first, a partial absence from the ship, after the signing of the agreement, not treated by the master as an absolute desertion, by which the forfeiture of two days' wages, for every day's absence is incurred. Secondly, a total quitting of the ship, after her arrival, and before the discharge of cargo, which entails a loss of one month's pay. Thirdly, absolute desertion, which consists of an absence, without leave for any time during the twenty-four hours, preceding sailing, or for any period during the same twenty-four hours, under circumstances, indicating an intention of not returning. It is clear that the Statute meant to draw a distinction between a total quitting of the ship, after her arrival, but before the delivery of her cargo, and an absolute desertion. By the common law, the contract of the seamen terminated with the ship's arrival in port, and did not extend to the time of delivering her cargo. Consequently, an entire forfeiture of wages, was not at common law incurred by any seaman, who quitted the ship between the time of her arrival and the delivery of her cargo. But because it was found inconvenient, that mariners should leave their vessel before her cargo was discharged, the Statute 2 Geo. 2, c. 36, s. 6, imposed the penalty of a loss of a month's wages, on all mariners who should so leave. In the case cited from *Robinson's Admiralty Reports*, a total forfeiture was incurred, because the voyage was not terminated.—[Lord Abinger, C. B.—The schedule of the Act contains a short agreement, which contains no stipulation that the seaman shall stay till the discharge of the vessel; but the body of the Act declares, that if he quits her before the discharge of cargo, he shall forfeit a month's pay.—*Parke, B.*—A sailor is now bound to read the Act of Parliament, as well as his agreement.—Lord Abinger, C. B.—Suppose a seaman, after the ship's arrival at her moorings, and before her discharge, quits the ship, and afterwards returns to her; would he forfeit a month's wages?—He would. Absolute desertion is defined in the 9th section of the Act, to be the absence of a seamen for any time within the twenty-four hours next preceding the sailing of the ship, or for any period however short, under circumstances, showing an intention of not returning to her. The words "twenty-four hours" override the whole sentence, and then to constitute an absolute desertion, the absence, with an intention of not returning, must take place within the twenty-four hours, immediately preceding the time of sailing. It would be hard, if a sailor should be held to have forfeited all his wages, by reason of his quitting the ship, after she has arrived

at her place of destination. The loss of a month's pay, is a sufficient penalty for quitting the vessel before her cargo has been discharged.

Cur. adv. vult.

Esq. equet.
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LORD ABINGER, C. B., afterwards delivered the judgment of the Court.—This was a motion for entering judgment for 11*l.* 17*s.* 8*d.* *non obstante veredicto* (f). The Court have taken time to consider their judgment, and are of opinion that the rule must be absolute. The question turned upon the construction of the 5 & 6 *Will.* 4, c. 19, s. 9. The action was brought for wages, and the defendant pleaded that after the arrival of the vessel at the port of *Liverpool*, and before the discharge of her cargo, the plaintiff deserted, and thereby forfeited all wages. The words of the Statute are, "That every seaman who shall absolutely desert the ship to which he shall belong, shall forfeit to the owner or master thereof, all his clothes and effects, that he may leave on board; and all wages and emoluments, to which he might otherwise be entitled," and, "That an absence of a seaman from the ship, for any time within the space of twenty-four hours, immediately preceding the sailing of the ship, without permission from the master thereof, or for any period, however short, under circumstances plainly shewing that it was his intention not to return thereto, shall be deemed an absolute desertion."

It was insisted on the one side, that an actual desertion of the vessel before the final delivery of her cargo, was followed by a forfeiture of all wages; on the other side, it was contended that this clause was qualified by the 7th section, and that the desertion contemplated by the 9th section, was only a desertion before the actual arrival of the ship, and during her absence in a foreign country. In support of this construction, the 7th section was referred to, which specifically provides for the particular case of desertion after the arrival of the vessel, and before the delivery of her cargo. That section enacts that "in case any such seaman after having signed such agreement, or after the ship's arrival at her port of delivery, and before her cargo shall be discharged, shall quit the ship without a previous discharge, or leave from the master thereof, he shall forfeit to the master or owner thereof, one month's pay out of his wages." This clause then provides, for the express case of quitting the ship, after her return to a port in *England*, and before the discharge of her cargo, and as the plea uses the word desertion, to describe the case especially provided for by that section; in order to render the clauses consistent, we must construe the 7th section, as referring to a case of desertion after the arrival of the ship, and before the final discharge of her cargo, which would be followed by a penalty of one month's wages; but if the desertion took place in foreign parts, then of the whole wages. It was very reasonably urged, that a desertion in parts beyond the seas, should not be followed by the same penalty, as if the abandonment had taken place after the arrival of the vessel in port; nor should a desertion after the return of a ship, be followed by a forfeiture of all the wages earned during two or three years. These appear to us reasonable grounds for giving the interpretation contended for by the

(f) The rule, as originally drawn up, was to enter a verdict for the plaintiff for 11*l.* 17*s.* 8*d.*, if the Court should be of opinion, upon the facts proved at the

trial, that the plaintiff had forfeited no more than a month's wages. The rule was afterwards altered by the Court into its present form.

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plaintiff's counsel; besides which, upon referring to the former Statute, (2 Geo. 2, c. 36), that distinction appears. As the only desertion, in this case was a quitting the vessel after her return, and before the discharge of her cargo, it is attended by a loss of 5*l.* only, and as the sum of 11*l.* 17*s.* 8*d.* is still due, and the plea is no answer to the declaration, there ought to be judgment for the plaintiff for the last mentioned sum, notwithstanding the verdict for the defendant. The 2 Geo. 2, c. 36, which is repealed, contained in the form of the articles of agreement referred to, an enumeration of the particular cases likely to arise, which the seaman had an interest in considering; the last Statute introduces only a short form in the schedule, and incorporates those particular cases in the enacting clauses, instead of leaving them in the agreement itself; the consequence is, that the seaman who wishes to learn the conditions upon which he is bound, must refer to the Act of Parliament.

Rule absolute, for entering judgment for the plaintiff
 for 11*l.* 17*s.* 8*d.* non obstante veredicto.

In re SCOTT v. SILVER.

Under the 9 Geo. 4, c. 22, s. 60, the Speaker of the House of Commons has power to ascertain and certify the amount of costs, in cases in which the petitioner has failed to appear on the day appointed for taking the petition into consideration.

Semble, that the legislature intended to give no remedy for these costs by action, as it had done under the 53 Geo. 3, c. 71, but that the remedy on the recognizance was still to continue.

MAULE had obtained a rule to shew cause why the recognizances entered into, and certified into this Court, should not be vacated. In the year 1837, an election took place for the county of *Merioneth*, at which Mr. *Richards* and Mr. *Scott* were candidates, when Mr. *Richards* was returned as duly elected; a petition was presented to the House of Commons against his return by Mr. *Scott*, on which occasion he and *Silver*, as his surety, entered into the recognizance required by the 5th section of the 9 Geo. 4, c. 22 (a). The petitioner did not appear on the day appointed, for taking the petition into consideration, and the order for that purpose, was in consequence discharged. The Speaker then caused the costs of the sitting member to be taxed; and delivered his certificate of the amount, pursuant to the 60th section of the same Act (b). The amount not having been paid, the Speaker

(a) Which enacts, "That no proceeding shall be had upon any such petition, unless the person or persons subscribing the same, or some one or more of them, shall, within fourteen days after the same shall have been presented to the House, or within such further time as shall be limited by the House, personally enter into a recognizance to our sovereign lord the King, according to the form hereunto annexed, in the sum of 1000*l.*, with two sufficient sureties in the sum of 500*l.* each, or four sufficient sureties in the sum of 250*l.* each, for the payment of all costs, expences, and fees which shall become due to any witness summoned in behalf of the person or persons so subscribing such petition, or to any clerk or officer of the House, upon the

trial of such petition, or to any party who shall appear before the House, or any committee of the House, in opposition to such petition, in case such person or persons shall fail to appear before the House at such time or times as shall be fixed by the House for taking such petition into consideration; or in case such petition shall be withdrawn by the permission of the House; or in case such committee shall report to the House, that such petition appears to them to be frivolous and vexatious."

(b) Which enacts, "That the costs and expences of prosecuting or opposing any petition presented under the provisions of this Act, and the costs, expences and fees which shall be due and payable to any witness summoned to

certified the recognizances into this Court, under the 65th section (c). It was objected that the terms of the 60th section limited the Speaker's power to direct the costs to be taxed to those cases in which there had been "A determination of the merits of the petition."

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Sir *W. W. Follett* shewed cause, and *Maule* supported the rule; but as the arguments and Statutes cited fully appear in the judgment, it is considered unnecessary to repeat them.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—An application was made some time ago, but not argued until late in the last Term, to take a recognizance off the file, which had been certified into this Court by the Speaker of the House of Commons, pursuant to the 9 *Geo. 4*, c. 22, s. 65. The facts were, that a petition was presented against the return of a member for the county of *Merioneth*, and the usual recognizance was entered into, but the petitioner omitted to appear before the House on the day fixed for hearing the petition, in consequence of which, no committee was struck for the trial of the merits of the election. The Speaker, however caused the costs to be taxed by the persons pointed out by the 60th section; and the petitioner having refused, for six months after the demand of the amount, to pay them to the party petitioned against, the Speaker certified

attend before such committee, or to any clerk or officer of the House of Commons, upon the trial of any such petition, shall be ascertained in manner following (that is to say), that on application made to the Speaker of the House of Commons, within three months after the determination of the merits of such petition, by any such petitioner, party, witness, or officer, as before mentioned, for ascertaining such costs, expences, or fees, the Speaker shall direct the same to be taxed by two persons (describing who they are to be), and the persons so authorized and directed to tax such costs, expences, and fees, shall, and they are hereby required to examine the same, and to report the amount thereof, together with the name of the party liable to pay the same, to the Speaker of the said House, who shall, upon application made to him, deliver to the party or parties a certificate, signed by himself, expressing the amount of the costs, expences, and fees allowed in such report, together with the name of the party liable to pay the same; and such certificate, so signed by the Speaker, shall be conclusive evidence of the amount of such demands, in all cases and for all purposes whatsoever."

(c) Which enacts, "That if any petitioner or petitioners who shall have entered into such recognizance as afore-

said, shall neglect or refuse, for the space of seven days after demand to pay to any witness who shall have been summoned on his or their behalf before the House, or such select committee, on the trial of such petition, the sum so certified as aforesaid by the Speaker to be due to such witness, together with the sum of 40s. per diem, for every day during which such petitioner or petitioners shall delay to satisfy the same; or if such petitioner or petitioners shall neglect or refuse for the space of six months after demand, to pay to any officer of the House, or to any party who shall appear in opposition to the said petition, the sum so certified by the Speaker as aforesaid to be due to such officer or party for their fees, costs, or expences, and that such neglect or refusal shall be proved to the Speaker's satisfaction; in every such case such person or persons shall be held to have made default in his or their said recognizance; and the Speaker of the House of Commons shall thereupon certify such recognizance into the Court of *Exchequer*, and shall also certify that such person or persons have made default therein; and such certificate shall be conclusive evidence of such default; and the recognizance being so certified, shall have the same effect as if the same were estreated from a Court of law."

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the default and recognizance into this Court. The question is, whether he had power to do so, and the recognizance can be enforced.

This question depends upon the construction of the 9 *Geo.* 4; and the only difficulty in the case, upon the face of the Statute itself, arises from the wording of the 60th section, which taken to the letter, appears to authorize a taxation of costs only in the case where there has been a determination of the merits of the petition: and the Speaker is to certify such costs only, and in the event of the nonpayment of the costs so certified, and those only, is he authorized to certify the recognizance into the *Exchequer*. It is not contended, on the part of the Crown, that the Speaker can certify such a recognizance into this Court at common law. Certainly his certificate of the default would not be binding and conclusive; and it is therefore argued, on the part of the conusors, that in the event which has happened, as the recognizance could not be certified under the Statute, it has never been forfeited at all, and ought to be taken off the file.

The Act in question is not very carefully drawn; and there are difficulties in the way of the construction contended for on both sides. In order to give effect to that offered on the part of the Crown, the words of the 60th section must be qualified, and construed to mean, that the costs are to be taxed within three months after the determination of the merits of such petition, if such determination should take place, otherwise at any time; on the other hand, the construction proposed by the conusors, renders one clause of the condition of the recognizance inoperative. The recognizance is rendered defeasible if the conusors "shall pay the costs and expences of the party, who shall appear before the House in opposition to the petition, in case the petitioner shall fail to appear before the House, at the time fixed for taking the said petition into consideration, or in case the petition shall be withdrawn, or in case the select committee shall vote the said petition to be frivolous and vexatious;" and it is not merely a clause in the recognizance, stated in the schedule, which might have been copied incautiously from that in 53 *Geo.* 3; but in the enacting part of the Statute itself, section 5, it is provided, that the recognizance shall be so conditioned.

We must, therefore, in construing the Statute, either modify the language of the 60th section, or wholly strike out a part of the recognizance, and read it as if the condition were to pay, only in case the petition was voted frivolous and vexatious; of these two courses, if we are to determine the question of construction by the terms of the Act itself alone, the one which does the least violence to the words of the legislature, is to modify the language of the 60th section in the manner proposed, and that done, we give effect to every enactment of the Statute. We make every part of the recognizance operative, and enable the Speaker to direct the costs to be taxed in every case; and not only does this construction of the Act do the least violence to its words, but is most consistent with one of the manifest objects of the legislature, the prevention of vexatious petitions. If the construction contended for on the part of the petitioner were to prevail, petitions might be presented for the purpose of vexation and annoyance, or with a view of disabling a member from serving on committees, and abandoned at the last moment, without any evil consequence under the Act, to the parties petitioning, or their sureties; and the petitioners might thus, by their own mere authority, in effect, withdraw a petition, which, by the 9th section, the House itself is prevented from permitting them to do, except in certain cases. The argu-

ment on the other side is, that it would be an advantage to the sitting members, that their opponents should have this *locus penitentiae*, by which they might save both parties the expence of litigation before a committee; but this argument may be answered on the other side, by the observation, that according to the construction contended for by the Crown, there will be the same *locus penitentiae* if the sitting member chooses to give it, by agreeing, that provided the petitioner should abstain from appearing before the House on the day fixed, he would forego the claim for his costs, and not procure them to be taxed.

The view, therefore, that we take of the Act itself, adopting the usual rules of construction, and considering the object of the legislature apparent on the face of the Act, is, that the recognizance has been forfeited in this case, and duly certified into this Court.

But it is said, that a reference to the Statutes on this subject, which the 9 *Geo.* 4, was to consolidate, amend, and simplify, ought to lead us to a different conclusion; and from that reference, coupled with the Act in question, it will appear to have been the intent of the legislature, to have taken away from the party petitioned against, the right to his costs, if the petition was abandoned, and the petitioner did not appear in the House at the day appointed. The examination of the provision of these Statutes, though it has induced us to entertain more doubt, than we should have done on the purview of the Statute 9 *Geo.* 4, alone, does not lead us to this conclusion.

The Statutes to be examined are, the 28 *Geo.* 3, c. 52, and 53 *Geo.* 3, c. 71. The 28 *Geo.* 3, c. 52, is the first Statute which requires a recognizance. Section 5, enacts, that no proceeding shall be had on any petition, unless a recognizance is entered into in a certain time, in the sum of 200*l.*, with two sureties in 100*l.* each; the condition of which is, that the petitioner is to appear on the day fixed for the taking the petition into consideration, and also to appear before any select committee that shall be appointed for the trial of the petition, and shall renew the same, until the committee should have been appointed, or the petition withdrawn by permission of the House. This recognizance, it is to be observed, is not for payment of costs, but becomes absolute in default of appearance; and section 9, empowers the Speaker to certify it to the Court of *Exchequer*. Sections 19, 20, and 21, give costs to the sitting member, if the petition is voted frivolous and vexatious; and to the petitioner, if the opposition to the petition is voted to be of that character; and also provide for costs, in the case where no party appears before the committee in opposition to the petition; all which costs the Speaker is authorized, upon application, to cause to be taxed, in the manner pointed out by the 22d section; and the costs, when certified, may be recovered by an action of debt. As the law stood, therefore, by this Act, there was no specific remedy for the costs of a sitting member, incurred in preparing to defend his seat, in case the petitioner did not appear before the House on the day appointed to take the petition into consideration, but the recognizance was forfeited by non-appearance; it could not be saved by the payment of any costs, and the penalty became a debt to the crown.

The 53 *Geo.* 3, c. 71, reciting that it is expedient to make provision to secure the more punctual payment of costs, expences, and fees, which may become due to witnesses, officers of the House, and parties, by reason of the trial of controverted elections, requires an additional recognizance in 1,000*l.*,

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with two sureties in 500*l.* each, for the payment of costs to witnesses, clerks, and officers, and likewise to the party appearing before the House in opposition to such petition, in case the petitioner shall fail to appear before the House at the time fixed for taking the petition into consideration, as also if the petition shall be withdrawn, as well as for the payment of costs in case the committee shall vote the petition frivolous and vexatious. This Statute also provides, by section 9, that in all cases where the petitioner shall fail to appear before the House, at the time fixed for the appointment of the select committee, the order for taking the petition into consideration shall be thereupon discharged, and the parties attending in opposition to the petition, shall be entitled to recover from the petitioner the expences which they shall have incurred by reason of the petition; and they are to be recovered in the same manner as the other costs provided for by that Statute, that is, as costs were levied under the former Statute when the petition was voted frivolous and vexatious. By section 12, in default of payment, the recognizance is to be estreated. By section 13, the Speaker's certificate, with respect to costs under that Act, or the 28 *Geo.* 3, was to operate as a warrant of attorney.

The effect of this Act was to give a remedy for the costs incurred, in case of non-appearance, both by the forfeiture of the recognizance, and by action of debt on the Speaker's certificate. The Act also provides, for the first time, by the form of the recognizance, for the payment of costs, in case the petition should be withdrawn, which is permitted by section 8, the former Statute of 28 *Geo.* 3, having prohibited the House from allowing it, unless in the event of the vacancy of the seat by death or otherwise. But it is worthy of remark, that the 53 *Geo.* 3, nowhere gives any power in express words to the Speaker to tax the costs in this case. The 9 *Geo.* 4 was then passed, in order to consolidate the law relating to the trial of controverted elections. At the time it passed, two recognizances were required (and they are reduced into one), and the provisions for the taxing and recovery of costs were contained in different sections of the two Acts of the 28 *Geo.* 3, and 53 *Geo.* 3. The 19th, 20th, and 21st sections of the former Act provided for the case of a committee sitting, and voting the petition or opposition as frivolous and vexatious, or the return corrupt or vexatious; in which several cases application is to be made to the Speaker, and the costs taxed. The 7th section of the 53 *Geo.* 3, applied to the costs and fees of witnesses, clerks, and officers; and the 9th, 10th, and 11th sections of the same Statute, provided for the case of the petitioner failing to appear before the House on the day fixed; and there was no provision at all for such taxation, in the case of the petition being withdrawn. The 57th, 58th, and 59th sections of the 9 *Geo.* 4, re-enact the provisions as to costs given in case the committee meet. By the 19th, 20th, and 21st sections of the 28 *Geo.* 3, then the mode of taxation of costs of prosecuting or opposing a petition, which, in the 28 *Geo.* 3, c. 52, s. 22, is confined to the three cases before mentioned, is, by the 60th section of 9 *Geo.* 4, left at large; and this last section provides for "the costs and expences of prosecuting and opposing any petition;" not for the costs and expences in the several cases before mentioned, as had been done by the 22d section of the 28 *Geo.* 3. The same 60th section also provides for the costs due to witnesses, clerks, or officers, which had been provided for by section 7 of the 53 *Geo.* 3; thus incorporating the two sections together, and providing for the taxation of costs, whether payable to parties, witnesses, clerks, or officers. There is, however,

no clause corresponding with the 9th section of the 53 *Geo.* 3, expressly making the petitioner liable to the costs, in case of not appearing in the House on the day fixed; and it is on the absence of such provision, that much stress was laid on the part of the petitioner. We do not mean to say that the argument is not entitled to much consideration, and that it has not created some doubt in our minds upon the present question; but we think that its omission may be accounted for, by supposing that the legislature may have intended to give no remedy for these costs by action, as it had done under the 53 *Geo.* 3; but the remedy on the recognizance would still continue.

Upon the whole, we think, that upon the true construction of the 9 *Geo.* 4, the recognizance has been forfeited; and this view of the case is fortified by the opinion of the Court of *King's Bench*, expressed, though extra-judicially, in the case of *Bruyeres v. Halcomb* (d).

Rule discharged.

(d) 3 Ad. & E. 381; 1 Har. & Wol. 410.

SERLE v. WATERWORTH.

DEBT upon a promissory note, made by the defendant in favour of the plaintiff, dated the 3d of *January*, 1837, for 24*l.* 1*s.* 4*d.*, "value received," payable twelve months after date. There was also a count upon an account stated.

Pleas: And the defendant, as to the first count of the declaration, says that one *Joseph Waterworth*, before and at the time of his death, to wit, on the 2d of *January*, 1837, was indebted to the plaintiff in a certain sum of money, to wit, 24*l.* 1*s.* 4*d.*, for the price and value of goods by the plaintiff then sold and delivered to the said *Joseph Waterworth*, which sum was due and owing to the plaintiff at the time of making the said promissory note in the first count mentioned; and that the plaintiff, after the death of the said *Joseph Waterworth*, and before the making of the said note, to wit, on the 2d of *January*, 1837, applied to the defendant for payment thereof, whereupon in compliance with the said request, the defendant, after the death of the said *Joseph Waterworth*, for and in respect of the said debt so then remaining due to the plaintiff as aforesaid, and for no other consideration whatever, then made and delivered the said note to the plaintiff. And the defendant further says, that the said *Joseph Waterworth* died intestate, to wit, on the same day and year aforesaid; and that at the time of the making and delivery of the said note as aforesaid, to the plaintiff as aforesaid, no administration had been granted of the estate and effects of the said *Joseph Waterworth*, nor was there at that time any executor or executrix of the estate and effects of the said

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To an action on a promissory note, at twelve months' date, the defendant pleaded that one *J. W.*, at the time of his death, was indebted to the plaintiff in a sum of money for goods sold and delivered; and that the plaintiff, after the death of *J. W.*, and before the making of the note, applied to defendant for payment; whereupon, in compliance with the request, the defendant, after the death of *J. W.*, for and in respect of the said debt, and for no other consideration whatever, then

made and delivered the note to the plaintiff; that *J. W.* died intestate, and that at the time of the making and delivery of the note no administration had been granted of the estate and effects of *J. W.*, nor was there at that time any person liable for the said debt. *Replication, de injuriâ*: —*Held*, that as the plea did not state that there were no assets, the forbearance to sue during the time the note had to run, was a sufficient consideration, and that the plaintiff was entitled to judgment *non obstante veredicto*.

A widow does not become executrix *de son tort* by occupying for three months her late husband's house and shop, if she no way carries on the business.

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Joseph Waterworth, nor was there at any time any person liable for the said debt, so remaining due to the plaintiff as aforesaid; and the defendant further says, that there never was any consideration for the said note, except as aforesaid. *Verification.* To the last count, never indebted.

Replication to the first plea, *de injuriâ*; on which issue was joined.

At the trial, before *Patteson, J.*, at the last Spring Assizes for the county of *York*, it appeared that the husband of the defendant had carried on the business of a hair-dresser, and had died intestate, on the 3d *October*, 1836. After his death the defendant continued to reside in a house which adjoined his shop, but there was no evidence of her having interfered in the business. On the 3d *January*, 1837, the plaintiff sent to the defendant an account of a debt due from her late husband, in consequence of which she gave the note upon which the present action was brought. Letters of administration were granted to the defendant on the 6th *March*, 1837. It was contended, on the part of the plaintiff, that the defendant was executrix *de son tort*; and further, that she was liable on the note, whether she filled that character or not. A verdict was found for the defendant, with liberty to move to enter a verdict for the plaintiff for the amount of the note.

Wightman having obtained a rule accordingly, and also for judgment *non obstante veredicto*,

Creswell and *Addison* shewed cause.—There was no evidence of such an intermeddling with the affairs of the deceased as to make the defendant executrix *de son tort*. It is true, that after her husband's death she continued to live in the house which adjoined the shop, but she never attempted to carry on the business. In *Hooper v. Summersett (a)*, the defendant not only lived in the house of the deceased, but continued to carry on his trade of a victualler. The trade of a hair-dresser is a personal occupation, and would cease with the death of the person carrying it on. Secondly, the plea is good in law; it is, in effect, that there was no consideration for the note. The fact of giving the note could create no personal liability to pay the debt. A promise to pay the debt of another, must be founded on a good and valid consideration, *Jones v. Ashburnham (b)*. The mere existence of a debt due from *A.* is no consideration for a promise from *B.* If, indeed, the defendant had been liable, as executrix *de son tort*, then the forbearance would have been a sufficient consideration. *Ridout v. Bristow (c)*, will perhaps be cited on the other side; but there the note was expressed to be "for value received by my late husband." Here the defendant is not stated to be the widow, and she may be considered as a mere stranger. It is admitted that a note *prima facie* imports consideration; but that may be met by evidence. Here none was proved, and the want of it is averred in the plea.

Wightman, in support of the rule.—The defendant was clearly executrix *de son tort*. Her husband died on the 3d *October*, and she remained in possession from that time until the *January* following, when, upon application being made to her for payment of the debt, she gave the note in question. She had the goods valued, and afterwards sold them. Much less intermed-

(a) *Wightwick*, 16.
(b) 4 *East*, 455.

(c) 1 *C. & J.* 231.

ding will make a person liable, *Noy*, 69. But, secondly, the plaintiff is entitled to judgment *non obstante veredicto*. By giving the note, the defendant protected herself from any suit for the recovery of the debt during the time the note had to run.—[Lord Abinger, C. B.—We cannot presume upon this plea that there were no assets.]—Suppose an action had been brought against the defendant for the recovery of the debt, and she had pleaded that she was in possession of her husband's goods, and was about to take out administration, and that in consideration of forbearance she gave the note, could it be doubted that such would be a good plea. In *Ridout v. Bristow*, the jury found that there was consideration for the note; but that was not left to them in this case. The circumstances of her being entitled to administration, and being in possession of the goods, and admitting the claim of the plaintiff, are sufficient to render her liable on the note.

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LORD ABINGER, C. B.—I think there was no ground for saying that the defendant was executrix *de son tort*. The only question then is, whether upon the face of the plea, there appears any consideration for this note, as between the plaintiff and the defendant. I think there is; and that the plaintiff, by receiving it, has precluded himself from suing for the debt of the husband so long as the note has to run. It is not stated in the plea that there were no assets.

PARKE, B.—*Primâ facie* there is a good consideration for the note; and the question is, whether the plea distinctly shews that there was no consideration. If it had shewn that there were no assets, the case might have been different; but is it not a sufficient consideration that the effect of taking the note, is to tie up the plaintiff's hands as against the defendant for twelve months? There is an agreement to forego all remedy for the debt for twelve months, in case the defendant took out administration, or intermeddled with the effects of her late husband. Whether or no, the effect of the note would be to conclude the plaintiff from suing a third person who might take out administration: upon that point I give no opinion. There can be no doubt that if a person give a promissory note to another, the latter is precluded from suing the former while the note is running. That being so, there is here a sufficient forbearance to constitute a consideration. This view of the case accords with the opinion expressed by *Bailey, B.*, in *Ridout v. Bristow*. Judgment must be entered for the plaintiff, *non obstante veredicto*.

BOLLAND, B., concurred

ALDERSON, B.—All the averments contained in the plea were satisfactorily proved. Then, the only question is, whether or no the plea is good. *Primâ facie*, a promissory note imports consideration; and *Ridout v. Bristow* shews that unless you negative all possible consideration, the holder of the note is entitled to recover. It is consistent with this plea that there was a good consideration; namely, that the plaintiff, by taking it, was precluded from suing for twelve months.

Judgment for the plaintiff, *non obstante veredicto*.

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STEWART and others v. ABERDEIN.

Where an insurance broker or other mercantile agent, has been employed to receive money for his principal in the general course of his business, and where the known general course of business is for the agent to keep a running account with the principal, and to credit him with sums which he may have received, by cheques in account with the debtors, with whom he also keeps running accounts, and not merely with monies actually received, and a settlement takes place according to that usage, the original debtor is discharged, and the agent becomes the debtor, according to the meaning and intention, and with the authority of the principal.

THIS was an action to recover a total or salvage loss of 97*l.* 11*s.* 8*d.* per cent. on the defendant's subscription of 100*l.* to a policy of assurance on the *Vrow Elizabeth*, at and from *Liverpool* to *Narva*, during the vessel's stay there, and thence to *Dantzic*. There were also counts for money had and received for interest, and upon an account stated.

First plea to first count. As to 97*l.* 11*s.* 8*d.*, parcel, &c., that Messrs. *Douglas, Anderson, & Co.*, as agents for the plaintiffs, adjusted a loss on the policy to that amount, and being indebted to the defendant exceeding that amount, the defendant, by the consent of the plaintiffs, paid that sum to Messrs. *Douglas, Anderson, & Co.*, by giving them credit in their account to that amount, which settlement and payment the plaintiffs accepted in full satisfaction of the sum of 97*l.* 11*s.* 8*d.*; and as to the residue of the sum in the first count, that no loss was sustained on the policy beyond the sum of 97*l.* 11*s.* 8*d.* so paid as aforesaid.

Second plea to the first count. As to 97*l.* 11*s.* 8*d.*, that Messrs. *Douglas, Anderson, & Co.* were insurance brokers, and the defendant was an underwriter in the city of *London*; that accounts existed between them, and on which Messrs. *Douglas, Anderson, & Co.* were indebted to the defendant exceeding the sum of 97*l.* 11*s.* 8*d.* The plea then stated a usage and custom amongst underwriters and insurance brokers on the settlement of losses on policies, to set off the premiums due to the underwriter against the loss; and that the broker should hold himself accountable to the assured for the payment of the loss, of which custom the plaintiffs had notice. That the loss was settled and adjusted at the amount of 97*l.* 11*s.* 8*d.* (as in the first plea), and that the defendant set off against the loss premiums for which he had credit in the account with Messrs. *Douglas, Anderson, & Co.*, who held themselves accountable to the plaintiff to that extent; that the plaintiffs acquiesced in the premises, and relinquished their claim against the defendant in respect of that sum, and accepted Messrs. *Douglas, Anderson, & Co.* as their debtors in lieu of the defendant, who was thereby induced to give fresh credit to them, whereby the cause of action with respect to 97*l.* 11*s.* 8*d.* became extinguished. And as to the residue of the cause of action, that the loss in the first count mentioned, was a partial loss only, and did not exceed the rate of 97*l.* 11*s.* 8*d.* on the 100*l.* insured by the plaintiffs. To the residue of the declaration, *non assumpsit*.

At the trial, before Lord *Abinger*, C. B., and a special jury, at the Sittings after *Michaelmas Term*, 1837, it appeared that the plaintiffs were general merchants, residing at *Liverpool*, and that the defendant was an underwriter at *Lloyd's* Coffee-house in *London*. The policy was effected on the 26th *September*, 1835, by *Douglas, Anderson, & Co.*, brokers, in *London*, as agents for the plaintiffs, and the defendant subscribed his name upon it for 100*l.* It appeared from the books at *Lloyds'*, that the loss took place in *May*. At that time *Douglas, Anderson, & Co.* were indebted to the defend-

ant in a balance of 217*l.* 3*s.* 8*d.* on their underwriting account of the previous year, up to *March*, 1836, and in the month of *June*, 1836, their clerk paid the defendant's clerk 100*l.* on this account, leaving the balance of 117*l.* 3*s.* 8*d.* to meet the loss on the *Vrow Elizabeth*. The documents to establish the loss, were not brought forward until *September*, 1836, and upon the 20th of that month it was adjusted by the defendant and all the underwriters, except two, at 97*l.* 11*s.* 8*d.* per cent. A memorandum was written on the policy, stating the loss to be payable at one month; and the defendant's signature was struck through; and the loss was then passed into the accounts of *Douglas, Anderson, & Co.* and the defendant, in their respective books; but the accounts were not formally agreed between them.

Messrs. *Douglas, Anderson, & Co.* had a general account current, as well as an insurance account, with the plaintiffs, each being kept quite distinct, and the balance of the insurance account being, at certain periods, carried into the general account as cash. The further information required by the two underwriters, who had not adjusted the loss in *September*, was laid before them in the early part of *November*, and *Douglas, Anderson, and Co.* having advised the plaintiffs of the loss being about to be settled by them, the plaintiffs drew two bills for 600*l.* each, on the 16th and 17th *November*; and on the 19th, *Douglas, Anderson, & Co.* enclosed them a credit note on account of the settlement of the whole loss, the amount of which, 1,155*l.* 3*s.* 10*d.*, they put down to the credit of the insurance account, of which they sent an extract, and then debited them with the premiums to the end of *September*, leaving a balance of 886*l.* 12*s.* 7*d.* due, the 21st *February*, in the plaintiff's favour, which was transferred to the credit of the general account. At the bottom of the credit note was written, "Above is the credit note of the loss per *Vrow Elizabeth*, 1,155*l.* 3*s.* 10*d.*, but without our prejudice until in cash from the underwriters."

On the 21st *November*, 1836, the plaintiffs acknowledged the receipt of these accounts, and stated that they would be examined. On the 26th *November*, in the same year, *Douglas, Anderson, & Co.* stopped payment; and as soon as the plaintiffs were aware of this circumstance, one of them came up to *London*, and demanded payment of the underwriters, when this and other actions were brought. The usage, as stated in the second plea, was proved, and was said to be well known at *Liverpool*.

It was contended, on the part of the plaintiffs, that the set-off between the brokers and underwriters was not binding upon the plaintiffs, who were not expressly shewn to have any knowledge of the usage; and it was also contended that the memorandum at the foot of the credit note shewed that the brokers did not treat the settlement as conclusive. The learned judge left it to the jury to consider, whether parties effecting insurances for their own benefit through an agent, must not be taken to know what is the habit of dealing between the brokers and the underwriters; and whether the term "to settle," must not mean, that the broker should settle in the same way as is the custom to settle with underwriters. If so, he considered the broker to be liable to his principal after such settlement, and that the pleas were proved; but if it was only expected that the payment should be a payment in cash, then the plaintiffs were entitled to a verdict. The jury found for the defendant.

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Creswell obtained a rule to set aside the verdict, and for a new trial, on the ground that there was no evidence of the plaintiffs' knowledge of the usage; and also that the learned judge had misdirected the jury as to the credit note.

Maule shewed cause.—There was sufficient evidence of the usage to go to the jury; and in that respect the case differs from *Tood v. Reid* (a). This mode of conducting business is not contrary to reason or to common sense, but is the general practice in mercantile affairs. The broker becomes a debtor to the underwriter in respect of the premiums of insurance, and the underwriter becomes the debtor of the assured in respect of the loss. Is there, then, any thing unlawful in an agreement, that the assured should receive his money from the broker, and that the debts due from the underwriter to the assured, and from the broker to the underwriter, should both be discharged. *Russell v. Baugley* (b), was decided on the ground that the name of the underwriter had not been struck off the policy. In *Scott v. Irving* (c), Lord *Tenterden*, C. J., in delivering judgment, says, "If the usage relied on in this case were allowed to prevail, it would have the effect of making the broker, and not the underwriter, the debtor to the assured for the loss. Such a usage, however, can be binding only on those who are acquainted with it, and have consented to be bound by it." Here there was distinct evidence of the usage. The same learned judge, in *Bartlett v. Pentland* (d), says, "Merchants residing in London, and effecting insurances, may reasonably be expected to be acquainted with the usage, and to act upon it." That observation is equally applicable to merchants at *Liverpool*. In the cases cited, it appeared that the plaintiffs were ignorant of the usage; but here there was strong evidence to go to the jury that it was known and adopted by the plaintiffs, and the jury have found it was so.

' *Secondly*, there was no misdirection respecting the letter containing the credit note. It is said that the expression, "without prejudice until in cash from the underwriters," shews that *Douglas & Co.* had no authority to receive except in cash; and that therefore the set-off in account between them and the defendant, does not bind the plaintiffs. But the whole meaning of the letter was left to a jury of merchants, who have put their construction upon it. The jury were told, that if a broker choose to settle in account with the underwriter, as between him and the underwriter, the broker would be liable, and could not defend himself in an action by him for money had and received, *Andrews v. Robinson* (e).

Creswell and *Cowling*, in support of the rule.—It was not proved that any actual adjustment of accounts, which could amount to a payment, ever took place between *Douglas & Co.* and the defendant, nor was such agreement shewn as is alleged in the first plea. The custom is beneficial only to the broker and underwriter, and is extremely inconvenient to the assured, who has to take the security of the broker, instead of that of several underwriters. —[*Parke*, B.—When does the broker consider himself indebted to the prin-

(a) 4 B. & Ald. 210.

(b) 4 B. & Ald. 395.

(c) 1 B. & Adol. 612.

(d) 10 B. & C. 760.

(e) 3 Camb. 199.

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cipal, as between him and the underwriter; is it necessary that the account should be actually gone into by them?—The jury should have been asked whether they found that the plaintiffs had a specific knowledge of the custom, and adopted it. The only dealing of the plaintiff is an authority to the broker to apply a certain sum in a particular way, and upon certain events to receive money for him. This is a mere private arrangement between the broker and underwriters, which cannot bind the plaintiffs without express notice.—[Lord Abinger, C. B.—The underwriter is discharged when the broker is chargeable; he has had authority from his principal to settle with the underwriter, and up to the time of the settlement the principal may interfere.]—*Tood v. Reid* shews the opinion of the Court upon such a custom. There it was distinctly held, that an insurance broker was only entitled to receive payment for the assured from the underwriter in money; and that a custom to set-off the general balance due from the broker to the underwriter, in the settlement of a particular loss, was illegal, on the ground that it was an attempt to pay the debt of one person with the money of another.—[Parke, B.—That case is not correctly reported, as I perceive by a note of mine. There it did not appear that the account had been allowed between the broker and the underwriter.]—No doubt a custom exists for the broker and underwriter to settle for their own convenience; but in order to fix the plaintiffs, it ought to have been shown, not only that they knew the custom, but also agreed to be bound by it. It is clear, from the case of *Russell v. Baugley*, that the mere fact of the broker having made himself responsible, does not bind the plaintiffs. In *Bartlett v. Pentland*, an attempt was made to distinguish that case from *Russell v. Baugley*, because there the underwriter's name had not been struck out of the policy; but the Court thought that circumstance made no difference, unless it were done with the consent of the assured. In *Scott v. Irving* this question was again discussed, and the Court came to the same conclusion. There was nothing to shew any agreement on the part of the plaintiffs to be bound by this arrangement.

Secondly, as to the misdirection. From the words of the credit note, "without prejudice until cash," it is clear that there was no such settlement as to discharge the underwriters. If every thing were settled, that expression could have no meaning. It is said that this resembles the case where an underwriter is presumed to have under his consideration the nature of the voyage to be performed, and the usual course and manner of doing it, *Pelley v. The Royal Exchange Assurance (f)*. But here the policy contains no stipulation that the underwriter may settle in this manner to the prejudice of the assured.

Cur. adv. vult.

Lord ABINGER, C. B.—This was an action on a policy of insurance on the *Vrow Elizabeth*. The defendant pleaded, first, that *Douglas, Anderson, & Co.* were the insurance brokers and agents of the plaintiffs. That after the loss had occurred, they were authorized by the plaintiffs to adjust and settle the loss, which they did, at the sum of 97*l.* 11*s.* 8*d.*; that *Douglas, Anderson, & Co.* (as such brokers) were indebted to the defendant at the time of such adjustment, in a larger sum of money than the amount so settled, and that by

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the authority and with the sanction of the plaintiffs, *Douglas & Co.* accepted a credit in account with the defendant, as a satisfaction and payment of the sum of 97*l.* 11*s.* 8*d.*, and made themselves liable to the plaintiffs for the same, who discharged the defendant therefrom. This is the substance of the plea, or all that need be proved to entitle the defendant to a verdict in regard to the 97*l.* 11*s.* 8*d.* There is a second plea, which, in addition to these material facts, sets forth a custom between the insurance brokers and the underwriters in *London*, to make these settlements in account, by way of payment and discharge, according to a certain usage set forth in the plea. It then alleges, that the plaintiffs had knowledge of that custom, and assented to it, and that the settlement was made accordingly. The jury found a verdict for the defendant, upon which there was a rule to shew cause why there should not be a new trial, on the ground that there was no evidence that the plaintiffs had any knowledge of the custom alleged, or had assented to it; and secondly, that there had been a misdirection as to the interpretation of a letter of the plaintiffs' to the defendant, containing what was called the credit note. This case has been very fully and ably argued on both sides; and in the course of the argument a point has been discussed which was not suggested on the original motion for a new trial, and which was not brought into controversy at the trial at all; namely, whether there was any evidence that the defendant ever did come to such a settlement in account with the insurance brokers, as is by him in the pleading alleged. The Court has taken the whole argument into full consideration, and has come to the conclusion, that there was evidence of the settlement in account; that there was no misdirection upon the letter, the meaning of which, as part of a mercantile correspondence, using mercantile and technical expressions, was left to the judgment of a jury of merchants, nor was it material to the issue. And finally, that even if the custom was not specifically proved, as alleged; or if it was not proved, that the plaintiff had a precise knowledge of the custom, as alleged, yet there was sufficient evidence to prove the first plea, if not the second, of a custom between the brokers and underwriters to make settlements in account, by taking credits as payments, and also of the knowledge of the plaintiffs of such a custom, and of their authorizing the brokers to settle with the underwriters, and to give them (the plaintiffs) credit in account for the loss, and to permit them to draw on the brokers for the amount. It must not be considered that by this decision the Court means to overrule any case by deciding that where a principal employs an agent to receive money, and pay it over to him, the agent thereby acquires any authority to pay a demand of his own upon the debtor, by a set-off in account with him. But the Court is of opinion, that where an insurance broker, or other mercantile agent, has been employed to receive money for his principal, in the general course of his business, and where the known general course of business is for the agent to keep a running account with the principal, and to credit him with sums which he may have received by credits in account with the debtors, with whom he also keeps running accounts, and not merely with monies actually received, the rule laid down in those cases cannot properly apply; but that where an account is *bona fide* settled according to that known usage, the original debtor is discharged, and the agent becomes the debtor, according to the meaning and intention, and with the authority of the principal. The rule, therefore, must be discharged.

Rule discharged.

KING v. BENNETT.

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THE following case was stated for the opinion of the Court, by the consent of the parties; the Court being at liberty to refer to the pleadings, as part of the case.

On the 25th of *May*, 1837, the plaintiff put up for sale, by public auction, a dwelling-house and premises, in the county of *Gloucester*, subject, among others, to the following conditions of sale:—That the vendor should, before the 1st of *July* next, prepare and have ready for delivery, an abstract of his title to the property, and should deduce a good title thereto. That the purchaser should, on or before the 1st of *August* then next, deliver a statement in writing of his objections, if any, to the title, and in default thereof should be considered as having accepted; and all objections not then made should be considered as waived; and in case any objection should be taken to the title, it should be in the power of the vendor to annul the sale, and to return the deposit money to the purchaser, in full satisfaction of all damages, costs, and charges which such purchaser should sustain.

Sarah Hewitt being seised in fee of certain premises, and among others, those put up for sale as aforesaid, by her will, bearing date the 23d of *December*, 1811, and duly executed to pass real estates, devised the said premises so put to sale, as follows: "I give and devise my messuages, outhouses, courts, gardens, orchards, and three closes of ground, with the tithes and appurtenances thereof, situate at *Killcott* aforesaid, now in the occupation of *Hiscox*, unto the said *John Morris*, and *Ann* his wife, and the survivor of them, for and during their lives, and the life of such survivor; and from and after the death of such survivor, I give and devise the said last mentioned messuages, outhouses, courts, gardens, orchards, closes, tithes, and premises unto *Sarah* the wife of *John King*, esq., and one of the daughters of the said *William Holborow*, the elder, for and during her life, and after her decease unto the said *John King*, if he survives her, for and during his life; and from and after the decease of the survivor of them, the said *John King*, and *Sarah King* his wife, I give and devise the same last-mentioned messuages, outhouses, courts, gardens, orchards, closes, tithes, and premises, unto the second son of them, the said *John* and *Sarah King*, and the heirs and assigns of such second son for ever." At the time of making this will, the said *John* and *Sarah King*, in the said will named, had had three sons, that is to say, *Elisha*, *John*, and *William George*, but *William George* was the only one then living, *Elisha* having died in the month of *August*, 1809, and *John* having died in the month of *May*, 1811. At the time of making her will, the testatrix was acquainted with the state of the family. She died in the year 1821. In the month of *May*, 1813, the said *John* and *Sarah King* had a fourth son, *Henry King*, who died in the month of *April*, 1814; and in the year 1815 they had a fifth son, *John Henry King*, the present plaintiff. *William George King* is now alive. *John Morris*, and *Ann* his wife, and *John* and *Sarah King*, who are respectively named in the will, were all dead some time before the said sale. At the sale the defendant was the highest bidder, and

The testatrix, after devising her real estate to *S. K.*, and then to *J. K.* for life, if he survived her, gave and devised the same unto "their second son, and the heirs and assigns of such second son for ever." At the time of making the will they had had three sons, but only one was living, which circumstance the testatrix was aware of. Afterwards, and before the death of the testatrix, a fourth son was born, and died, and there was a fifth son born, who survived the testatrix: *Held*, that after the death of *S. K.* and *J. K.* the fifth son was entitled to take under the terms of the devise.

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the plaintiff, within the time mentioned in the conditions, prepared and delivered an abstract of title to the premises, wherein he assumed himself to be entitled thereto in fee, as the second son of *John* and *Sarah King*, by virtue of the will of *Sarah Hewitt*; and the defendant, within the time mentioned in the conditions, objected to the title so produced, on the ground that the plaintiff was not the second son of *John* and *Sarah King*, according to the true construction of the will of *Sarah Hewitt*.

The question for the opinion of the Court is, whether the plaintiff has a good title, in fee simple, to the premises so put up to sale. If he has, a judgment is to be entered for the plaintiff, by confession, for 814*l.* 10*s.* If the Court shall be of opinion that he has not, judgment of *nolle prosequi* is to be entered for the defendant.

R. V. Richards, for the plaintiff.—This being a question of intention only, must be governed by that which appears on the face of the will. The present plaintiff takes the estate in fee as the second son. The state of the family must be looked at, either at the time of the making the will, or at the time of the testatrix's death. In *Lomax v. Holmden* (a), Lord *Hardwicke* says, "It must be admitted the general rule, in the construing of a will is, that the time of making, not of the death of the testator, is to be regarded. The making and the death, and not the intermediate time, are only to be regarded in construing wills. If the testator could not mean the time of making, he must mean the time of his death, when the instrument would be complete." Now, here the state of the family exclude the time of making the will, as that which was to be looked at, as there was then no second son; the time of the death must therefore be resorted to, when the plaintiff was the second son. *Driver, d. Frank v. Frank* (b), will perhaps be cited on the other side; but there the only question was, whether a particular estate vested.

Stephen, for the defendant.—The term, "second son," must mean the person who should be born second son after the date of the will: that was *Henry King*, and if he had survived the testatrix, there can be no doubt that he would have been entitled to the estate. The plaintiff must contend that the term "second son," means any one; but as the intention is to govern in these cases, it is more reasonable to suppose that the testatrix meant the son who should be second born after the date of the will, *Ulrick v. Litchfield* (c). If the devise had been to a second son, and there had been none at the time, but a second son had been born afterwards, who ultimately became the eldest son, he would still retain the property, *Trafford v. Ashton* (d). In *West v. The Lord Primate of Ireland* (e), the case of *Lomax v. Holmden* was referred to, but the principle was not supported. Supposing *Henry* had left issue, could that issue have been excluded, under the devise to the second son, "his heirs and assigns for ever?" Formerly, a will as to personal property, was understood to speak from the death of the testator; and as to real property, from its date; but since the recent Act, 7 *Will.* 4, and 1 *Vict.*, c. 28, s. 24, the time of the death is to be regarded in both cases. The testatrix in mention-

(a) 1 Ves. sen. 290.

(b) 3 M. & S. 25.

(c) 2 Atk. 372.

(d) 2 Ver. 660; 1 Eq. Ca. Abr. 213.

(e) 3 Bro. C. C. 143.

ing the second son, speaks with reference to *William*, who was then the first. *Driver, d. Frank v. Frank*, shews that the parties are to be connected in the order of their birth.

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R. V. Richards replied.

LORD ABINGER, C. B.—I think this case must be governed by the authorities cited on behalf of the plaintiff; and that all the argument on the part of the defendant is put aside, when once you cease to take the second son in the order of birth. It is clear that the testatrix could never have meant the second son in the order of birth, as she knew he was dead at the time she made her will. Supposing the eldest son had died, and that afterwards three sons were born, two of whom were living at the time of the testatrix's death, the second then alive would take under the terms of this will. The second son in the order of birth being excluded, the question is, what did the testatrix mean? I am of opinion that she meant the one next the eldest, whoever he might be. Supposing the second son had died before the testatrix, and had left issue, we might perhaps have been obliged to look further, to see whether, under those circumstances, she meant to make provision for the whole branch. However, that does not appear in the present case. We cannot construe the will, with reference to any other time, than either its date or the death of the testatrix. At the time of making her will there was no second son in existence; then, she must clearly have meant such person as should be second son at the time of her death.

BOLLAND, B.—I am of the same opinion. At the time of making the will there was only one son alive; he never could be considered the second son. Then, in 1813 another was born, who died; and then the present plaintiff, who was the fifth son in the order of birth, but the second at the time of the death of the testatrix, claims the property. The testatrix might have thought that the eldest son was provided for, and therefore she left this property to such person as should be the second son at the time of her death.

ALDERSON, B.—If you take the time of making the will, it is quite clear that the testatrix never contemplated leaving the property to the son then living, but to a person thereafter to be born; for at that time there was no person who could answer the description of "second son." Then, the rule laid down by Lord *Hardwick* is, that you must look at the state of the family at the time of the testator's death. At that time *John Henry* was the second son. It was suggested by the defendant, that an intermediate brother *Henry* answered the description; but *Lomax v. Holnden* shews that he is not to be so considered. In the case of *West v. The Lord Primate of Ireland*, the plaintiff was clearly out of the question, as he was neither the seventh child nor the youngest. No seventh child was living at the time of the testator's death. Upon the death of the seventh child, who was born afterwards, nobody but Lady *Matilda* could answer the terms of the bequest.

GURNEY, B., concurred.

Judgment for the plaintiff.

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SCARFE v. MORGAN.

The plaintiff sent a mare to the defendant, a farmer, to be covered by a stallion belonging to him; the contract was performed on a Sunday. The defendant afterwards claimed to detain the mare until he was paid a sum of money, which consisted of the fee due on that occasion, and also of other monies due to the defendant on their general account.

Held, First, that the defendant was entitled to a lien for the costs of covering the mare.

Secondly, that this was not a contract within the 29 Car. 2, c. 7, s. 1, it not being made in the exercise of the defendant's ordinary calling; and that even if it were, the contract having been executed, the lien would attach.

Thirdly, that the claim by the defendant to retain the mare in respect of two sums, for one of which the lien could not be supported, was not a waiver of his lien as to the other, nor did it dispense with the necessity of a tender of that sum.

TROVER for a mare. *Pleas*: not guilty, and that the plaintiff was not possessed of the mare. At the trial, before *Parke, B.*, at the Spring Assizes for the county of *Norfolk*, it appeared that the mare in question had been several times sent to the defendant for the purpose of being covered by a stallion of his, and for the last occasion, the sum of 10*s.* became due to the defendant. On the mare being demanded back by the plaintiff, the defendant claimed to detain it, until he was paid the sum of 9*l.* 7*s.*, which consisted of the defendant's charges for the covering of other mares of the defendant, and also included the claim of 10*s.* The plaintiff made no tender. It also appeared that *Sunday* was the day on which the mare was covered. The jury found that the mare was in the possession of the defendant. It was urged, on the part of the plaintiff, *first*, that no lien could arise in such a case; *secondly*, that contract having been performed on a *Sunday*, was void; and *lastly*, assuming that a lien existed, that the defendant had waived it by claiming his general balance. A verdict was found for the plaintiff for 25*l.*, with liberty to move to enter a nonsuit.

Byles having obtained a rule accordingly,

Kelly and *Gunning* shewed cause.—Though there are numerous precedents of actions for services of this nature, yet there is no instance of a right of lien having been set up. The nature of the transaction is totally inconsistent with such a claim. The only case in favour of the defendant is *Beran v. Waters (a)*, which is a *Nisi Prius* decision. There it was held, that a trainer has a lien on a race horse for the expences and skill bestowed in the keeping and training him, upon the principle, that when a bailee bestows labour and skill in the improvement of the subject delivered to him, he has a lien for the charge. The correctness of that ruling seems, however, to have been doubted in the subsequent case of *Jacobs v. Latour (b)*. Such a right has been disallowed in the case of a livery stable-keeper, *Judson v. Etheridge (c)*. It is doubtful whether a farrier has a lien on a horse for shoeing him. It is, indeed, so said in argument, in *Muspratt v. Gregory (d)*; but that assertion seems at variance with the judgment of Lord *Ellenborough*, in *Rushforth v. Hadfield (e)*. This claim cannot rest upon the ground of any labour bestowed by the groom, since he has a distinct remuneration on the occasion. If the bailee be entitled to the lien, the amount due to him would be continually increasing according to the accumulation of the charge for keep. Besides it would be impossible to say when the lien attached.

Secondly, this is a contract in the way of a man's ordinary calling, and having been made on *Sunday*, is void. On that ground no lien could attach. The object of the 29 Car. 2, c. 7, s. 1, would be frustrated unless it be made

(a) 1 M. & M. 235.

(b) 2 M. & P. 201; 5 Bing. 130.

(c) 1 C. & M. 743.

(d) 2 Gale, 158; 1 M. & W. 633.

(e) 7 East, 224.

to embrace cases like the present. *Ex parte Middleton (f)*.—[*Parke, B.*—Here the contract is executed, and the parties are in *pari delicto*.]

Thirdly, the defendant claimed to detain the mare, not in respect of the particular lien, but on account of a general lien for a larger sum of money. It is well established, that if a party insist upon detaining property, either for a different, or for a larger sum than that to which he is entitled by law, the right to lien is lost; and in that case, a tender of the smaller sum is unnecessary *Knight v. Harrison (g)*.—[*Parke, B.*—Must you not make out that there has been a waiver of the lien?—*Alderson, B.*—How can it be said, that if a man claim sum A. and also sum B., he therefore waives his claim to sum B.? If an action be brought for 20*l.*, the fact of 10*s.* only being due, would not dispense with the necessity of tendering the latter sum.]—The circumstance of there being a particular sum named, makes no distinction on the principle; in each of the cases the smaller sum has been included, *Ayling v. Williams (h)*, *Boardman v. Sill (i)*. The true question is not whether there has been a waiver of the lien, but a waiver of a tender of the smaller sum, in in respect of the particular lien.—[*Bolland, B.*, referred to *Green v. Farmer (j)*.]

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Byles and *O'Malley*, in support of the rule, were requested to address themselves to the first point only.—The right to lien in this case is supported by analogy. There is an express authority in *Yelverton, 67 (k)*, that a farmer is entitled to a lien. With respect to carriers, *Lord Ellenborough*, in *Rushforth v. Hadfield (l)* says "In many cases it would happen that parties would be glad to pay small sums due for the carriage of former goods rather than incur the risk of a great loss by the detention of goods of value." A carriage sent to a builder, is subject to his lien for repairs done to it. In *Green v. Shewell*, before *Parke, B.*, at *Nisi Prius*, a claim of lien was urged in respect of repairs, some of which had been ordered and some not, and it was objected that the party claiming it had lost his right, because he had not severed the portions of his claim; but the learned judge held otherwise.—[*Parke, B.*—I have referred to my note, and find that the point did arise, and was disposed of as stated.]—In *Kirkman v. Shawcross (m)*, *Lord Kenyon* states it to be consistent with the spirit by which the Courts are guided, not to abridge this right; and the same expression is attributed to *Best, J.*, in *Jacobs v. Latour*. Before the case of *Chace v. Westmore (n)*, it was considered that an agreement for the payment of a fixed sum, was a waiver of the right of lien, but that case established a different doctrine, namely, that though such lien might be waived by special agreement as to the time or mode of payment, yet it could not, by the mere agreement, to pay a fixed sum. If any value were communicated, it matters not that it was not done through the instrumentality of human labour; for instances may be cited of recognized liens, though no work be done upon the chattel, as in the case of warehouse room, the *King v. Humfrey (o)*. The expression of *Lord Ellenborough* to the contrary, in *Boardman v. Sill*, amounted only to a doubt. There is no

(f) 3 B. & C. 164.

(g) Cited in Saund. Pl. & Ev. 641.

(h) 5 C. & P. 399.

(i) 1 Camb. 410, n.

(j) 4 Burr. 2214

(k) Cited in Saund. Pl. & Ev. 641.

(l) 7 East, 228.

(m) 6 T. R. 14.

(n) 5 M. & S. 180.

(o) 1 McClel. & Y. 173.

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doubt that an agister of cattle has a lien. The ground of the decision in *Chapman v. Allen* (p), must be considered as overruled by *Chace v. Westmore*. There a difficulty was suggested as to the increasing claim for the charges of keep; but why should not the owner provide food, as in the case of beasts distrained and impounded at common law (q).

PARKE, B.—With respect to the principal point, the Court will take time to consider; as to the two other questions, we feel no difficulty. First we think, that if the defendant had a lien, he did not waive it by claiming the whole of the unsettled demands. The only way in which that could be made use of was, either to show that he waived his lien in respect of the smaller sum, or that he dispensed with a tender of that sum; but looking at the mode in which the demand was made, it is clear that he neither did, nor intended to do, one or the other. The cases referred to by Mr. *Kelly* are distinguishable. In *Boardman v. Sill*, the defendant did not set up his lien at all, but claimed to retain the goods, on the ground that he had a property in them. So in *Knight v. Harrison*, a right of property was claimed in a third person, against whom the defendant had a lien for his general balance. In this case it is impossible to say that the defendant meant to waive his lien for the 11s., when that was one cause for which he expressly held the mare. So the circumstances would equally exclude the notion that he meant to dispense with a tender, to which no allusion was made. There may, no doubt, be circumstances which would dispense with a right of lien, but they are not strong enough in the present case to have that effect. It seems to me therefore that the defendant cannot be deprived of his right of detaining the mare by any thing which passed on the occasion of the demand being made. With respect to the other point, that this was an illegal contract, we think it does not fall within the Statute of *Charles*, as the business of a person in his ordinary calling. The defendant, who was a farmer, only occasionally employed the stallion which he possessed. Besides, this is not the case of an executory contract, but one which has been executed, and though in the former case, when both parties are in *peri delicto*, the law will not assist either to enforce the performance of the illegal contract; yet where the contract is executed, the property passes and must remain.

BOLLAND, B., concurred.

ALDERSON, B.—It appears to me a monstrous proposition, that a party who claims a lien in respect of two sums, is supposed to have waived it in respect of one of them. The more natural conclusion is, that he intended to insist on both. It was the duty of the plaintiff to have tendered either one sum or the other. If he had said, I tender this specific sum, it might have caused the defendant to reflect whether he had a right to detain the mare for the other claim.

On the main point the judgment was subsequently delivered by,

PARKE, B.—The question that awaits our determination is, whether a

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specific lien exists in this case, the jury having found that the mare was delivered into the possession of the defendant for the purpose specified, and remained there until the money became due, and the demand was made to restore her. The circumstances of the case are new ; but it must be decided by the general principles which regulate the law of lien. It was correctly laid down in *Bevan v. Waters*, that where a bailee spends labour and skill in the improvement of the chattel bailed, he has a lien upon it, for his remuneration. Many instances may be given to illustrate this doctrine ; and such specific liens being consonant with the principles of natural equity, are favoured by the law, and regarded liberally for the bailee. The question then is, does the present case fall within the general principle. And, as the mare may become with foal by the stallion belonging to the defendant, we think, that when delivered to him for the purpose mentioned, she answers the description of a chattel delivered to a particular person, in order to be improved by his labour and skill. But there is another question necessary to be considered ; that is, whether there is any thing in the nature of the present contract, inconsistent with the existence on a lien. Previously to the case of *Chace v. Westmore*, it was thought that liens could exist only in the case of implied contracts, but it was there established, that a lien may be upheld, even if there be an express contract, provided there be nothing in the nature of that contract inconsistent with it. And this exception is shewn in the instance of a livery stable keeper, who is not entitled to a lien upon the horse, which has been given into his possession, because, from the very nature of the contract, he is bound to re-deliver the animal to the bailor, whenever required. In *Jacobs v. Latour*, a doubt was expressed, whether a training groom, had a lien upon a horse, delivered to him to be trained, but the question in that case, turned on this, whether there was any stipulation, that the animal should be re-delivered, when required for the purpose of running the race. Here, however, there is nothing in the nature of the contract, at all inconsistent with the existence of a lien, the contract being, that the mare was to be covered by the stallion, for a specific sum ; and it was laid down in *Cooper v. Andrews (r)*, that "in all personal contracts, the word *for* works, as a condition precedent, *e. g.* if I sell you my horse for 10*l.*, you shall not take my horse, unless you pay me 10*l.*," &c. A difficulty, however, presented itself in the course of the argument, who should feed the animal during the continuance of the lien, supposing it to exist ? That difficulty has been satisfactorily answered, by a reference to the liability of preserving the chattel, which arises in the case of beast impounded, and corn detained by way of lien. On the whole, we think, that a lien in this case does exist, and that our judgment should therefore be for the defendant.

Rule absolute to enter a nonsuit.

(*r*) Hob. 41.

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LOUISA CURSHAM, SUSANNAH W. MERRICKS, and HARRIET
MERRICKS v. WILLIAM CHARLES NEWLAND and others.

Testator devised his freehold, copyhold and leasehold estates to his wife for life, and from and after her decease, to his son and daughters, "and their lawful issue" respectively in tail general, with benefit of survivorship to and amongst the issue respectively, as tenants in common, and not as joint tenants:—*Held*, that by the word "issue," the testator must be taken to have meant "children," and that his children took life estates as tenants in common, in the freehold and copyhold lands, with contingent remainders to their children by purchase, as tenants in tail, with cross remainders over; and that the children and grand-children took corresponding interests in the leasehold, by way of executory bequest.

BY order of the *Master of the Rolls*, the following case was sent for the opinion of this Court (a).

Richard Merricks made his will, duly executed and attested, and bearing date the 2d day of *June*, 1821, and thereby (amongst other things,) gave and devised his undivided third part of certain messuages, lands, tenements, hereditaments, and premises, situate in the parish of *Hellingly*, in the county of *Sussex*, in the occupation of his nephew, *B. W. Gilbert*, or his undertenants or assigns, unto, and to the use of his nephews, *B. W. Gilbert* and *G. F. Gilbert*, and their assigns respectively, during their natural lives, and the life of the longest liver of them; and after the determination of those estates by forfeiture or otherwise in the lifetime of his said nephews, or the survivor of them, to the use of his trustees, *W. C. Newland*, *W. W. Holland*, and *H. Hall*, and the survivors and survivor of them, and the heirs of such survivor, during the natural lives of his said nephews, and the life of the survivor of them, upon trust to preserve the uses therein limited from being defeated, &c.; and from, and after the decease of his said nephews, or the survivor of them, to the use of all and every the lawful children of them, his said nephews, and their heirs and assigns for ever, as tenants in common; and in case there should be only one such child, then to such only child, and his or her heirs and assigns for ever; but in the event of there being no such child, or there being children of his said nephews, or such only child, and they or he or she dying in the lifetime of the said *B. W. Gilbert*, and *G. F. Gilbert*, or the survivor of them, without having lawful issue, then from and after the decease of the said *B. W. Gilbert*, and *G. F. Gilbert*, and the survivors of them, the testator gave and devised all the said messuages, &c., to the same uses as he had thereinafter directed, as to the disposal of his residuary, real and personal estate, and effects. And the testator directed that his trustees, should, within three calendar months after his decease lay out and invest in their names, in some of the government funds, the sum of 4,000*l.*, sterling, and stand possessed of the stocks and funds so purchased, upon the trusts following, that is to say, (in trusts for his son, *Richard Merricks*, and any wife surviving him, for life); and from and after the decease of the survivor of them, upon trust to pay the principal of the said trust monies, stocks, or funds, in equal shares, unto and amongst all and every the children of his said son *Richard Merricks*, lawfully begotten, who should live to attain the age of twenty-one years, being a son or sons, or being a daughter or daughters should live to attain that age or be married with the consent of parents or guardians; and if there should be only one child of his said son who, being a son should live to attain the said age, or being a daughter, should attain the said age, or be married with such consent as aforesaid, then upon trust to pay

(a) The same case had previously been sent for the opinion of the Court of *Common Pleas*. See 2 Bing. N. C. 58, 2 Scott, 105.

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assign, or transfer the whole of the said trust stocks or funds to such only child, for his or her own use and benefit absolutely. But in case his said son, *Richard Merricks*, should die without leaving *lawful issue*, or leaving lawful issue, *such issue, being a son*, should not live to attain the age of twenty-one years, or being a daughter, should not attain that age, or be married as aforesaid, then upon trust, immediately after the decease of his the testator's said son *Richard Merricks*, and his wife, and the survivor of them, to pay, assign, and transfer the said principal trust stocks, and funds, in equal shares between and amongst the testator's four daughters, *Elizabeth Buckton*, *Louisa Merricks*, *Susannah W. Merricks*, and *Harriet Merricks*, who should be then living, or the *lawful issue* of such of them as should be then dead, *such issue* taking the part or share which *their, his, or her mother* would have been entitled to, had she been then living; such share to be divided in equal parts, shares, and proportions amongst the children of such of his daughters, who should be then dead, if more than one, and if but one, then the whole of such, his deceased daughter's share should go and be paid to such only child; and if neither of the testator's said daughters should be living at the decease of his said son, *Richard Merricks* and his wife, without leaving *lawful issue as aforesaid*, then he directed that the whole of the said trust stocks and funds should be divided between and amongst all his grandchildren, being children of his aforesaid daughters, equally between them. The testator then directed the investment of three other sums, of 3,000*l.* each, for the benefit of his unmarried daughters, and their *respective issue* lawfully begotten, "upon exactly the same trusts, and to and for the same ends, intents, and purposes," with regard to his said daughters and any husbands they might leave surviving them, and the *lawful issue* of them his said daughters respectively, with remainder over, *on failure of issue*, to his said son and his other daughters, and their issue, as were before declared with respect to the said sum of 4,000*l.* thereinbefore directed to be laid out for the benefit of his said son *Richard Merricks*, and any wife and issue he might leave." After a similar trust declared of a further sum of 1,000*l.* limited to the separate use of the testator's daughter *Elizabeth Buckton*, the will contained the following residuary devise. "I give, devise, and bequeath all the rest of my freehold, copyhold, and leasehold estates, with all my household goods, plate, linen, china, and all other my real and personal estate, with their appurtenances, according to the nature and quality of such estates respectively, to my dear wife, *Elizabeth Merricks*, for her own absolute use and benefit for and during the term of her natural life; and from and immediately after her decease, unto my said son and daughters, *Richard Merricks* and *Elizabeth*, the wife of the said *George Buckton*, *Louisa Merricks*, *Susannah Woodyer Merricks*, and *Harriet Merricks*, and their *lawful issue* respectively, in tail general, *with benefit of survivorship* to and amongst their issue respectively, *as tenants in common*, and not as joint tenants: provided always, that such *issue* not to have a *vested interest* until they attain the age of twenty-one years, *being sons*, and *being daughters*, until they shall attain that age or be married; but during the minority of the said *issue* of my said son and daughters respectively, I do hereby authorize my said trustees, or the survivors or survivor of them, or the heirs of such survivor, after the death of either my said son or daughters respectively, to apply the whole or any part of the rents, issues, and profits of the said estates, and not exceed-

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ing the interest of such presumptive share of each *child* therein, for and towards his, her, or their maintenance, education, and advancement in life during minority; and in case my said son and daughters, or any or either of them, shall die in my lifetime, or after my decease, without leaving lawful issue, or with lawful issue which, being a *son or sons*, shall not live to attain the age of twenty-one years, or being a daughter or daughters, shall not live to attain that age or be married, then the part or share, or parts or shares of him, her, or them so dying to be for the benefit of the survivors and their issue, in the same manner as their original parts and shares are hereinbefore given to them respectively as aforesaid."

And the testator appointed the said *W. C. Newland, W. W. Holland*, and *Henry Hall*, executors of that his will.

The testator departed this life on 26th day of *June*, 1822.

The said *B. W. Gilbert* has one child only, the defendant *Thomas Gilbert*. The said *G. F. Gilbert* never has had any child. The said *Richard Merricks*, the son of the testator, has never had any child. The said *Louisa Merricks*, now *Louisa Cursham*, (one of the plaintiffs,) never had any child. The said *Elizabeth Buckton*, (one of the defendants,) has seven children, all of whom are infants under the age of twenty-one years.

Elizabeth Merricks, the devisee for life, died in the month of *April*, 1823.

The question for the opinion of the Court is, what estates the children of *Richard Merricks*, the testator, took in the freehold, copyhold, and leasehold lands respectively, devised by his will, and whether the grandchildren take by purchase any and what estates in the same lands respectively, or any of them.

The following were the points for argument stated on each side.

The plaintiffs will submit, that they take estates tail, in the residuary freehold and copyhold estates, subject to limitations over by way of contingent remainder, and that they take corresponding interests in the residuary leasehold estates held for years, subject to a limitation over by executory bequest, and that there are interests in the nature of cross-remainders in favour of the plaintiffs, as between them and their co-devisees, *Richard Merricks* and *Elizabeth Buckton*.

The defendants will contend, that the residuary freehold and copyhold estates, are devised to the testator's son and daughters, as tenants in common, for their respective lives only, with contingent remainders of their respective shares to their respective children, by purchase, as tenants in common in tail, with cross-remainders between the children in tail, with cross-limitations between the families: and that the residuary leasehold estates, *i. e.* chattels real, are subject to corresponding limitations.

The case was argued in *Hilary Term*, 1837, by,

Hodgson, for the plaintiff.—The plaintiffs who are the three daughters of the testator, take under the will estates tail, subject to certain limitations over, by way of contingent remainder to their children. The question is, whether the words "lawful issue," are to be considered as words of "inheritance," or of "purchase." The general rule for construing these words is laid down in *Doe, d. Jesson v. Wright (b)*, and in *Lees v. Morley (c)*. It

(b) 2 Bli. P. C. 1.

(c) 1 Y. & C. 589.

must be admitted that the construction put upon them, in the latter case, is adverse to the plaintiffs; but this case is distinguishable, from the peculiar language of the will; and it is submitted, that the Court may here construe them as words of inheritance. It is a principal well established, that where the testator uses words which have a technical meaning, they shall be construed in conformity therewith, unless it clearly appears that he intended that they should have a different meaning. The residuary clause is very artificially framed; yet the testator's intention may be extracted from it. He evidently contemplated that he had given different estates to different parties, and that some would have only life estates. The general intention of the testator must have been to give an estate tail; but he wished to give it in a particular form, and has, in consequence introduced some inconsistency in his devise. The term "vested interest" means a vesting in possession, and that is not to take effect until certain events shall happen. The testator intended to provide for the personality, and has inadvertently applied the words to all his property. The word "issue" is merely used to point out in which way the remainder is to go; it cannot be said that there is any gift or limitation over. On examination, the cases on this subject will be found to range themselves into five classes; first, when there is a devise to a man and the heirs of his body, *Wright v. Pearson* (d), *Goodright v. Pullen* (e), *Doe, d. Candler v. Smith* (f), *Doe, d. Bosnall v. Harvey* (g), *Doe, d. Jesson v. Wright*. Secondly, where there is a provision made for the devisee dying under twenty-one, *Doe, d. Candler v. Smith*, *Doe, d. Strong v. Goff* (h). *Crump v. Norwood* (i), the former of which is overruled by *Jesson v. Wright*, and the latter cannot be supported since that decision. Thirdly, when the word "children" is used, as in *Woollen v. Andrews* (j), *Mortimer v. West* (k). Fourthly, when the word "issue" occurs, as in *Doe, d. Blandford v. Appin* (l), *Doe, d. Dodson v. Grew* (m), *Doe, d. Cock v. Cooper* (n). The fifth, is where the term "heir male," has been used with superadded words of limitation, as in *Archer's Case* (o), *The King v. Burchell* (p), *Franklin v. Lay* (q), *Denn v. Puckey* (r), *Murthwaite v. Jenkinson* (s), *Frank v. Stovin* (t), *Mogg v. Mogg* (u), and *Harvey v. Harvey* (v). In all these cases it was determined that an estate tail was created, *Ryan v. Cowley* (w), before Lord Chancellor *Sugden*, in which there was a contrary decision, is distinguishable, because there was a power of appointment. And *Doe, d. Davy v. Burnsall* (x), and *Burnsall v. Davy* (y), both turned upon the fact of there being a contingent remainder. It is conceded, that by holding this to be an estate tail, a parent might defeat the devise over to his children; but it is by no means clear that the testator would have refused to give them that power.

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- (d) 1 Eden, 119.
- (e) 2 Ld. Raym. 1437; 2 Str. 729.
- (f) 7 T. R. 531.
- (g) 4 B. & C. 623.
- (h) 11 East, 668.
- (i) 7 Taunt. 362.
- (j) 2 Bing. 126.
- (k) 2 Sim. 276.
- (l) 4 T. R. 82.
- (m) 2 Wils. 324.
- (n) 1 East, 229.

- (o) 1 Co. Rep. 66.
- (p) 1 Eden, 424.
- (q) 2 Bli. 59, n.
- (r) 5 T. R. 299.
- (s) 2 B. & C. 358.
- (t) 3 East, 548.
- (u) 1 Mer. 654.
- (v) Reg., Book A. July, 1833 4.
- (w) 1 Ll. & Co. 7.
- (x) 6 T. R. 30.
- (y) 1 B. & P. 215.

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There is one clear estate tail given to each of the children, with cross-remainders between them, as in *Doe, d. Bean v. Halley* (z), and *Doe, d. Gallini v. Gallini* (a). The defendants say, that there are cross-remainders between the grand-children. Now, there is no such provision in the will; and if it be read as giving life-estates only to the testators, it will be necessary to add something to the will, in order that it may have that effect. That part of the certificate of the Court of *Common Pleas*, which says, that cross-remainders in tail were given among the parents, is right; but the prior part, that cross-remainders in tail are given among the grand-children respectively, is wrong.

Teed, for the defendants.—The true construction of the will is, that the testator's children take estates for life, with contingent remainders to their children, as tenants in common in tail, with cross-remainders in tail amongst them; and if any of the testator's children die without children capable of taking them, their shares are to go over to the other children in the like manner. The first question is, whether the devise to the children of the testator is for life or in tail, and that undoubtedly turns on the meaning of the word "issue;" and it may be fairly inferred from the other parts of the will, that the testator meant by it, "children." The issue, to take the share of the mother, must clearly be a child or children. So in the provision for the maintenance, during the minority of the issue of his son and daughters, he refers expressly to the use of the term "*said issue*," (as to which, see *Sibley v. Perry* (b)), the testator has, therefore, himself explained the sense in which he has used the word, and shewn that he did not mean to express an indefinite line of descendants, but only the children of his children. *Harvey v. Harvey* is the only case cited on the other side, in which there was a clause for maintenance during the minority of the issue. But *Hampson v. Brandwood* (c), *Lees v. Moseley*, *Ryan v. Cowley*, and *Horne v. Barton* (d), are authorities in support of the construction contended for by the defendants. If here the will contains a gift over on failure of issue, and the intention of the testator can only be effectuated by construing the devise as an estate tail, the Court will put that construction upon it. Here there is no gift over, and the intention of the testator will be fulfilled, if an estate tail be given to the grand-children. On the other hand, the construction contended for by the plaintiffs would altogether defeat his presumed intention of an equal division of the property amongst his sons and daughters; for if any of them had died in his life time, the share of the child so dying would have lapsed.

The other point is not of so much importance to the defendants; but, it is submitted, that the gift over on failure of any of the issue, is to take effect in the same manner as their original shares; that is, cross-remainders for life are created among the children of the testator, with cross-remainders in tail among their children.

Hodgson, in reply.—The testator has certainly used the word "issue," in

(z) 8 T. R. 5.
 (a) 5 B. & A. 621.
 (b) 7 Ves. 522.

(c) 1 Mad. 381.
 (d) Coop. 257.

the clauses relating to the personalty somewhat loosely, but, nevertheless, in the devise of the realty it has a certain and definite signification; and although the succeeding provisions create some confusion, they do not contradict the previous express devise. *Horne v. Barton*, is the case of an executory trust in which a Court of equity adopts a greater latitude than a Court of law can admit, in the construction of a legal devise.

Cur. adv. vult.

Lord ABINGER, C. B., now delivered the judgment of the Court.—This was a case sent by the *Master of the Rolls* for the opinion of this Court; and the question was, what construction was to be put upon the words made use of by the testator in the residuary devise contained in the will. We find no possible mode of construing this will which does not present considerable doubt and embarrassment; but, upon the whole, we think the most rational interpretation, and that which comes the nearest to the intention of the testator is, to construe the word “issue,” as meaning children. The result, therefore, is, that the children took estates for life, with remainder to their children in tail, as tenants in common.

The following CERTIFICATE was accordingly sent:

“WE have heard this case argued by counsel, and considered it; and we are of opinion, that the testator’s son and daughters took estates for their respective lives, in remainder after the death of the testator’s widow, as tenants in common, in the freehold and copyhold lands devised by the residuary clause, with contingent remainders in their respective shares to their respective children, by purchase as tenants in common in tail, with cross-remainders in tail between such children in such respective shares; with cross-remainders over in the whole of each of such shares respectively, on failure of all the children of any one son or daughter, and their issue, to the survivors or survivor of the testator’s sons or daughters for life; remainder in tail general to the children of (each) such surviving son or daughter respectively, in like manner, as in the original share given to such son or daughter respectively; and that the sons and daughters, and their children respectively, took corresponding interests in the leaseholds, by way of executory bequest. Dated this 5th day of *June*, 1838.

“ABINGER.
J. PARKE.
W. BOLLAND.
J. GURNEY.”

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SMEDLEY v. PHILPOT, Executor.

The defendant's testatrix had successively employed two solicitors *A.*, and the present plaintiff, in a Chancery suit, for an account of the estate of a testator, in which she had an interest. The suit having been abandoned by *A.* and the plaintiff, their bills remaining unpaid, it was undertaken by *B.*, as the solicitor of the testatrix, and by him carried on till her death. The defendant, as her executor, revived the suit, and continued *B.* as his solicitor, who conducted it to a decree. A decretal order was made, directing the defendant's costs, which included those of the three solicitors, *A.*, the present plaintiff, and *B.*, to be paid to *B.*, his solicitor, out of the fund in Court. This fund proving insufficient, a rateable deduction was made in the costs of the parties, pursuant to the order, and a certain sum paid to *B.*, as the defendant's solicitor. The present plaintiff having brought an action for his costs against the present defendant, as executor of the testatrix, and having recovered judgment of assets *quando acciderint*, sued upon that judgment, but withdrew the record on the defendant's agreeing to pay him a certain sum at that time, and the residue of his claim out of the first assets of the testator which should come into his hands. *B.*, after the date of the agreement, had received from the officer of the Court of Chancery the sum of 84*l.* 8*s.* 8*d.* in respect of the costs, and by the desire of the defendant, had paid to *A.* the amount of his bill, as well as the demand of other persons, accounting to the defendant for the residue.

Held, by Parke, B., and Alderson, B., Lord Abinger, C. B., *dissentiente*, that the sum of 84*l.* 8*s.* 8*d.* was assets in the hands of the defendant.

ASSUMPSIT on a special contract. The declaration stated, that in consideration of the plaintiff's withdrawing the record in a certain action then pending between him and the defendant, as executor of *Jane Carter*, the defendant, on December 12th, 1834, undertook to pay him 100*l.* at that time; and to pay, out of the first assets of *Jane Carter* that should come to his hands, a further demand which the plaintiff had against the said *Jane Carter*, deceased. The declaration, after averring that assets had come to the hands of the defendant, as executor, after the agreement, stated, as a breach, the non-payment of the money by the defendant. The defendant pleaded, *first, non assumpsit; secondly*, that no assets had come to his hands since the agreement; and upon these pleas issue was joined. At the trial, before Lord Abinger, C. B., at the *Middlesex* Sittings after *Trinity Term*, 1837, the following facts appeared in evidence. The defendant's testatrix, *Jane Carter*, twenty-seven years before this action, had filed a bill in equity for distributing the estate of a deceased person, to which she had certain claims. Her suit was first conducted by a solicitor, named *Jones*, who relinquished it during her life, his bill remaining unpaid. The suit was then undertaken by the present plaintiff, and he also abandoned it before his demand was satisfied. It was then taken up by a Mr. *Johnson*, who acted as the solicitor of *Jane Carter* to the time of her death. The suit was afterwards revived by the defendant, as her executor, and conducted by *Johnson*, as his solicitor, to a decree. In 1832 the *Master of the Rolls* made a decree, by which he ordered the costs of the parties to the suit to be taxed by the proper officer, and paid out of the fund in Court. The costs of the present defendant were ordered to be paid to Mr. *Johnson*, his solicitor, and the costs of the other defendants in the Chancery suit, to their respective solicitors. And it was also ordered, that if the fund should prove insufficient, the balance should be paid by the receiver of the estates devised, in proportions, to be settled by the master. It was also declared, that the costs ought to be borne by the persons interested in the annuities bequeathed by the testator's will, and the residuary estate of the testator, and by the personal representatives of the parties so interested, rateably and in proportion to the amounts of the several annuities and shares of the residue. Accordingly, the costs of the Chancery suit, including those of the three solicitors, *Jones*, the present plaintiff, and *Johnson*, were taxed to the amount of 67*l.* 3*s.* 6*d.* But the fund in Court proving deficient, a proportionate reduction was made in the costs of these parties, and ultimately the sum of 485*l.* 3*s.* 11*d.* was paid by the

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Accountant General of the Court of *Chancery* to *Johnson*, as the defendant's costs in the Chancery suit, including the whole costs incurred in the lifetime of the testatrix. The receiver afterwards paid to Mr. *Johnson* the sum of 135*l.* 5*s.* 8*d.*; and subsequently to the date of the agreement mentioned in the declaration two further sums, amounting to 84*l.* 8*s.* 8*d.* The present plaintiff, after the date of the agreement, brought an action against the defendant, as executor of *Jane Carter*, for the amount of his bill of costs, and had judgment of assets *quando acciderint*. He then brought an action upon the judgment, but withdrew the record on receiving a written agreement from the defendant to pay him the sum of 100*l.* at that time, and the remainder out of the first assets that should come to him as executor. *Johnson* had, by the defendant's direction, paid the amount of *Jones'* bill, together with other sums due to different persons, and had settled the remainder in account with the defendant. Lord *Abinger*, C. B., being of opinion, at the trial, that none of the sums received by *Johnson* were assets in the hands of the defendant, directed a nonsuit to be entered.

Kelly having, in the following Term, obtained a rule *nisi* for a new trial, on the ground of misdirection,

Platt and *Humfrey* shewed cause; and

Kelly and *Mansell* were heard in support of the rule.

Judgment was postponed till *Easter Term* of the present year, when there being a difference of opinion between the learned Barons, they delivered their opinions *seriatim*.

ALDERSON, B.—In this case the defendant, by the agreement stated in the declaration, undertook to pay the debt due to the plaintiff from the estate of *Jane Carter*, out of the first assets that should come to his hands as executor; and the question is, whether, subsequently to this agreement, any such assets have come to his hands. The contract was made on the 12th of *December*, 1834. It appeared, that many years ago the testatrix had filed a bill in equity for relief, in respect of certain claims which she had upon the estate of a deceased person. This suit was at first conducted by a solicitor named *Jones*, who had, during her life, discontinued proceeding with it, his bill remaining unpaid. The cause was then taken up by the plaintiff, as her solicitor, and a similar result took place. Lastly, it was conducted by Mr. *Johnson*, who remained solicitor till the death of the testatrix. The suit was then revived by the defendant, as her executor, and conducted by *Johnson*, as his solicitor, to a decree. A decree was made in 1832, by the *Master of the Rolls*, by which he ordered the costs of the parties to the suit to be taxed by the proper officer, and paid out of the fund in Court. This decree directed that the defendant's costs should be paid to his solicitor, Mr. *Johnson*. Under this decree the costs, which included those of *Jones*, of the plaintiff, and of Mr. *Johnson*, were accordingly taxed, altogether amounting to 678*l.*; but the fund in Court proving insufficient, the costs of the different parties were reduced rateably; and ultimately the sum of 485*l.*, or thereabouts, was paid by the officer of the Court of *Chancery* to Mr. *Johnson*, as the defendant's

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costs (including the whole cost incurred in the lifetime of the testatrix), in that suit. And after deducting the whole amount of the cost due to Mr. *Johnson*, both as solicitor for the defendant in that suit, and as solicitor for the testatrix in her lifetime, there remained in Mr. *Johnson's* hands a sum considerably exceeding the plaintiff's demand, and out of which, by the defendant's desire, *Johnson* paid the bill to *Jones*, and afterwards settled the remainder in account with the defendant, either by paying it to him, or to other persons by his desire. It distinctly appeared that *Johnson* had, subsequently to the 12th of *December*, 1834, received 8*l.* 8*s.* 8*d.*, part of the money in question, from the officer of the Court of *Chancery*.

Now, upon these facts, the plaintiff contends that all the amount received by *Johnson*, exceeding his lien for his own bill, was assets in the hands of the defendant; and, after full consideration, I have come to that conclusion. In *Sheppard's Touchstone*, 496, assets are thus defined: "All those goods and chattels, actions and commodities, which were of the deceased in right of action or possession as his own, and so continued to the time of his death, and which, after his death, the executor doth get into his hands, as duly belonging to him in the right of his executorship, and all such things as do come to the executor in lien or by reason of that, and nothing else, shall be said to be assets in his hands, to make him chargeable to a creditor or legatee."

It is perfectly clear that it is not necessary in all cases that the money or chattels shall have come to the actual possession of the executor; it is sufficient if it be in his power to receive, and he has actually dealt with them as received: as, if damages to the testator's estate under an award, be released by the executor, the release is equivalent to a receipt; so, if the money come into the hands of his agent, and he directs him to pay it over to a third person, the payment by the agent is, in fact, a payment by him, and the money so paid, must be considered as having come to the hands of the executor.

Here, therefore, if the monies paid to Mr. *Johnson* were in the nature of assets, the direction to pay a part over to *Jones*, and the settling the balance afterwards in account between *Johnson* and the defendant, would make this money assets in the hands of the defendant. The question then is, what was the nature of this money which came to the hands of *Johnson*.

Let us see how the estate of the testatrix stood at the time of her death. It was liable to the three attornies for the amount of costs; no doubt can be entertained as to that. On the other hand, the estate had a claim to be reimbursed in respect of these bills, out of the fund in the Court of *Chancery*, depending on the course of that Court, and to be determined by the judge of that Court, on the principles governing Courts of equity. It seems to me, that this, according to the definition above cited, was "a commodity which was of the deceased, in right of action, as her own, at the time of her death." It can make no difference, I think, in principle, whether the testatrix had paid, or was still liable at the time of her death to pay those bills, the amount of which constituted this claim. In an action for damages, arising out of an injury, a plaintiff recovers equally the damages which have been paid, and those which he has incurred a liability to pay. No distinction is ever drawn between them. Then, if so, this claim, when recovered, fulfils almost to the letter, the definition of assets, which I have cited from the *Touchstone*. It was said in the argument, that costs in equity differ materially from costs at law, being, as it is called, in the discretion of the Court. And so, in one sense,

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they are; that is to say, they do not follow the decision of the cause as at law, and are not governed by any such general rule. But in no other sense are they in the discretion of the Court. They form the subject of a distinct adjudication, depending on the particular circumstances of each case, applied to certain rules. But they are, of right, according to the proper application of those rules. This is fully discussed by Lord *Eldon*, in the case of *Vancouver v. Bliss* (a). In this case, therefore, the claim of the estate to be indemnified from the liability incurred by it in the lifetime of the testatrix, was equally a right of action at the time of her death, whether such claim were to be enforced at law or in equity, although the principles on which such claim would be allowed might differ in the two Courts. Nor do I think that the circumstance, that the costs are directed to be paid to Mr. *Johnson*, can make any difference, except as to the costs due to him. That portion of the sum awarded, although in the nature of assets, so far as regards the amount due to him from the testatrix, is not assets which have come to the hands of the defendant; for, by the decree, the defendant never had the right to receive them. But as the decree is wholly silent both as to Mr. *Smedley* and Mr. *Jones*, the defendant, and the defendant alone as I think, had the right to demand the surplus from *Johnson*. The decree is, that the defendant's costs shall be paid to Mr. *Johnson*. This only gives *Johnson* a limited lien for his own costs—no more; as to all the surplus, it is the defendant's, and to be paid to him. And so the parties have acted, for it has been disposed of by *Johnson* according to the defendant's directions. It is said that inconvenient results will follow from holding this to be assets, liable to the general distribution, according to the rules of law; and that this money, intended by the *Chancellor* for Mr. *Smedley* and Mr. *Jones*, will be intercepted in that case by creditors of a higher degree. If the estate be insolvent, it will be so; but in that case these gentlemen had only to apply to the Lord *Chancellor*, who would have saved, in his decree, their lien by a special direction. To treat *Johnson* as the trustee for the other two solicitors, will involve the case in great difficulties. In the first place, he will lose his own lien in part, or else be trustee for the surplus only. Now, surely the *Chancellor* could not mean, in making him trustee, to give him a preference over the other solicitors. Secondly, if trustee, he must be trustee for the estate as to the surplus, in case the other solicitors have been previously paid, either wholly or in part, and then he cannot safely pay over the residue to the other solicitors without taking the account between them and the estate. How is he to do that? Is it reasonable to suppose that the *Chancellor* meant this decree to be the foundation for two other suits in equity? Or, if this be money had and received to the use of the other solicitors, how much is so received? It is impossible not to see that the apparently inconvenient consequences must follow, if we should depart from the plain words of the decree, and if we do not hold it to mean an award of a given sum of money to the defendant for his costs, as the representative of *Jane Carter*, but to be paid to *Johnson*, in order that *Johnson* might retain thereout the amount of his own bill, and pay over the balance to the defendant himself, as an indemnity to the estate for the liabilities incurred in the suit with the two other solicitors. If so, then this surplus is assets in his hands.

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But, then, there is another question, whether the whole of the surplus be assets, which fall within this agreement. And as to that, I think that only the portion received by *Johnson* subsequently to the agreement, is within the terms of the agreement; that amount was 84*l.* 8*s.* 8*d.*; and to this extent I think the defendant was responsible. And it is satisfactory to me to find, that this view of the law meets the exact justice of this case; for if *Smedley* had proceeded in his original suit, he would, as a judgment creditor, have obtained a preference; and the agreement of the defendant only gives him the same advantage. If the defendant, in so agreeing, has placed himself in a disadvantageous situation as to other creditors, it is his own fault, for not letting the law take its course in the case of an insolvent estate. I think, therefore, that there should be a new trial.

PARKE, B.—In this case the plaintiff had a claim on *Jane Carter*, the defendant's testatrix, for a bill of costs of 317*l.* odd, and having brought an action thereon against the defendant, which was at issue, and stood for trial, an agreement was entered into between the plaintiff and the defendant, by which, in consideration of the plaintiff's withdrawing the record, the defendant promised to pay 100*l.* in part, and the residue whenever assets of *Jane Carter* should come into his hands. This agreement was the subject of the present action; and the pleadings raised the single question, whether, after the making of that agreement, any such assets had come to the hands of the defendant. On the trial, my Lord Chief Baron was of opinion that there was no proof of that fact, and therefore directed a nonsuit.

Upon the argument, on a rule nisi for a new trial, the only question was, whether a sum of 615*l.* 11*s.* 8*d.*, paid by order of the Court of *Chancery* to *Mr. Johnson*, the solicitor of the defendant, or any part of it, was assets. It seems to me, that a part of that sum was assets.

In order to understand the question, it is not necessary to give more than a short outline of the *Chancery* suit. It was not instituted originally by *Jane Carter* against the executors and legatees of annuities under the will of her father, for the purpose, amongst other things, of having her rights, and those of the other legatees, declared, and for an account of the testator's estate. The suit was afterwards revived against the representatives of some of the defendants, and by the now defendant, as executor of the plaintiff, some of the defendants, and the plaintiff, having died during the progress of the suit; and in 1813 a decretal order was pronounced by the *Master of the Rolls*, declaring the rights of the parties, and ordering that the Master should settle the costs, charges, and expences of all the parties, and that the same, when taxed and settled, should be paid out of the fund in Court, in the following manner: the plaintiff's costs, to *Mr. Johnson* his solicitor, and the costs of the different defendants, to their respective solicitors (naming them); and if the fund was insufficient, the balance was to be paid by the receiver of the estates of the different solicitors, in proportions, to be settled by the Master. And it was also declared, that the costs ought to be borne by the several persons interested in the annuities bequeathed by the testator's will, and the residuary estate of the testator, and the personal representatives of such of the persons so interested as were dead, rateably and in proportion to the amounts of their several annuities and shares of the residue; so that the parties contribute to the fund in different proportions than those of the expences

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actually incurred by them respectively in the suit. Many other directions were given, immaterial to the present purpose.

The Master taxed the costs of the plaintiff in equity, the now defendant, at 67*l.* 3*s.* 6*d.*, pursuant to this order, and afterwards there was paid to Mr. *Johnson* for those costs, out of the fund in Court, 485*l.* 3*s.* 11*d.*, and by the receiver, at a subsequent date, 135*l.* 5*s.* 8*d.*; and after the date of the agreement, 84*l.* 8*s.* 8*d.* The bill of costs so taxed, was made up of the costs of *Jane Carter* in her lifetime, who employed, first, Mr. *Jones*, and afterwards the plaintiff, as her solicitors; and of the now defendant's costs, as executor, who had employed Mr. *Johnson*. The question is, whether any part of that sum so received, was assets received by the defendant.

For the purpose of having a clear understanding of this question, it is necessary to bear in mind what the relative situation of solicitor, or attorney and party is, as to costs. The party employs the solicitor, whose remedy for the bill of costs is against his employer, by an action for his work, labour, and skill, which lies equally, if the solicitor has done his duty, whatever the event of the suit be. He has a lien upon, but no interest in, the costs recovered. These costs, which are payable from the adverse side, are only by way of an indemnity to the party for the costs incurred by him, and the receipt of them by the party in no way affects the right of action of the attorney or solicitor, who could not sue his client for money had and received. It is wholly immaterial to the right of action of the solicitor against the client, whether the client has received costs from the adverse side or not; and wholly immaterial to the right of the party to recover his costs from his antagonist, whether the party has paid them to his solicitor or not. Upon these points, I apprehend, there is no doubt.

If, therefore, a person recover a judgment at law for his debt and costs, both become a duty payable to him; and if he die, both are payable to his executor, and are assets when received by him. But if the attorney, employed by the deceased, is unpaid, he retains a lien on the judgment for his unpaid costs. If the testator recover a judgment for debt and costs, and his executor sue out a *sci. fa.* upon that judgment, the debt and costs due to the testator are assets, when received: the sum due for costs to the executor, is only by way of indemnity to himself, and is not assets. Upon this part of the case also, I conceive that no doubt exists.

But, not only are debts or duties, to which a deceased had a right of action, and which come to the executor's hands, assets, but also such things as come to the executor by reason of his executorship, although they were never vested in right or possession in the testator.

Therefore, although the testatrix had no decree for costs in this case, the amount decreed to be paid out of the fund to the executor in that character, by way of indemnity for the costs incurred by the testatrix and himself (for such is the real nature of the transaction), would, so far as related to the costs of the testatrix, be assets when received by the executor; and if the decree had directed the amount of the testatrix's costs to be paid to the executor, and they had been paid to the defendant, there would, I conceive, have been no doubt but that they would have been assets.

The doubt which has arisen is created entirely by the language of the decretal order, which directs the plaintiff's costs to be paid to Mr. *Johnson*, his solicitor; and it is contended, that this has the effect of making him a

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trustee for both the solicitors employed by the testatrix ; and, therefore, the receipt by him is no receipt by Mr. *Philpot*, the defendant. But I cannot see any proof of such intention in any part of this decretal order. *Primâ facie*, where a plaintiff's costs, or any other sum due to him, is ordered to be paid out of a fund in Court to his solicitor, I should say the only reason is, because the solicitor is the person *who represents* the litigant party for all purposes before the Court, and is the person to whom the actual payment by the Court would be made ; and the only consequence of such an order is, that if the solicitor be unpaid for the costs of the cause, or have any other demand on his client, he has a more effectual mode of securing his lien, for he may retain the amount of such costs or demand out of the money received by him. There is nothing in this case to shew that more was intended than a payment of a part of the fund in Court to the solicitor, as representing the party. The solicitors employed by the testatrix were not before the Court ; they have not applied to have any part of the amount to be taxed for costs, secured or appropriated for their use, on the ground that they could not obtain from their own client, or her representatives, the amount due to them for their labour and skill in conducting the suit in an earlier stage. If they had, the Court would have dealt with the application as it thought equitable ; but it seems to me to be a very forced construction of such an order as this, to say, that the Court meant to protect the interests of persons who had never sought protection, and who, it may be presumed, never wanted it ; for as they had ceased to be the solicitors employed, they would, *primâ facie*, be taken to have been either paid or satisfied, by their own client, the amount of their demand, or to have been content to look to the personal responsibility of that client for it.

The conclusion, therefore, to which I come is, that all the money received by *Johnson*, over and above what paid the amount of his own bill, was received on account of the executor, and was equivalent to a receipt by *him* in point of law ; and for that amount the defendant would have been responsible, as executor, in an ordinary action, and liable in this action, on his special agreement, for whatever *Johnson* received over and above the amount for which he had a lien, after the date of the agreement on which the action was brought, for he is bound by that agreement to apply all future assets received by him to the payment of the plaintiff's demand only. But, without doubt, any part which *Johnson* paid over to the defendant *Philpot*, either actually or constructively, by payment on account (and of this, from my lord's note, there is evidence for the consideration of the jury), would be assets.

If it should appear that *Johnson* had agreed with the plaintiff *Smedley* or *Jones* in such a way as to preserve their respective liens on the papers, given by the act of the testatrix, in the same manner as if they had continued to have them up to the time of the receipt of the money (supposing this could have been done), then, indeed, the amount for which such liens existed would be a charge on the fund, created by the act of the testatrix herself, and the balance only (if any) after satisfying such liens, would be assets. But it is enough to say, for the present, that no such agreement was made out in point of evidence. I think, therefore, that the rule should be absolute for a new trial.

Lord ABINGER, C. B.—The declaration was upon a special contract, bearing

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date the 12th of *December*, 1834, whereby, in consideration of the plaintiff withdrawing a record in an action then pending against the defendant, as executor of *Jane Carter*, the defendant undertook to pay 100*l.* then, and to pay the further demand which the plaintiff had against *Jane Carter*, deceased, out of the first assets of *Jane Carter*, which should come to his hands. It then averred, that assets had come to his hands, and assigned a breach of non-payment. The defendant pleaded that no assets had come to his hands since the agreement, upon which issue was joined. There was also a plea of non-assumpsit, on which the plaintiff proved the contract as alleged, which was made and dated 12th *December*, 1834. It appeared that *Jane Carter*, to whom the defendant was executor, had filed a bill in equity twenty-seven years ago, for taking the account and distributing the estate of a deceased person, in which she had an interest as one of the next of kin among whom the estate of the testator was to be divided, after the payment of various incumbrances. The plaintiff had been employed as her solicitor during part of the proceedings, but, for some reason which did not appear, had given up the suit, which had been transferred to another solicitor, Mr. *Johnson*, in her lifetime, who conducted it to the period of the decree, in 1833. The plaintiff's bill had not been paid when he transferred the papers to Mr. *Johnson*. *Jane Carter*, died in prison a few months after Mr. *Johnson* became her solicitor, leaving no property or claim to any property, except that which might be expected upon the result of the suit in equity, in case there should be any surplus of the testator's estate to be divided. The defendant, *Philpot*, as her executor, filed a bill of revivor to continue the suit, which was conducted for him also by *Johnson*. A final decree was made in the suit some time in 1833, by which certain sums of money were ordered to be paid into the Bank, to the account of the Accountant General, as part of the testator's estate; a receiver, who had been before appointed, was to continue to receive certain annuities and leasehold rents, part of the estate, and a certain leasehold interest was to be sold. It appeared by the recitals, that the estate was liable to various incumbrances, which need not be specified, which were all to be satisfied before any surplus could be divisible amongst the next of kin. It appeared also, that one of the parties to the suit, who was directed to pay money into the Bank, had also employed Mr. *Smedley*, the plaintiff, as his solicitor, and had paid his bill of costs, amounting to about 18*l.* The decree therefore, directed that this party should deduct, from the amount he was to bring in, the bill of costs so paid. The decree then directed that the Master should tax the costs of all the parties, and that out of the fund in Court, if sufficient, the Accountant General should pay Mr. *Johnson*, the plaintiff's solicitor, the plaintiff's costs, and to the other solicitors respectively their costs; and if the fund in Court were not sufficient for that purpose, then the receiver was ordered to supply the deficiency out of any funds which he might thereafter receive, or it was to be supplied out of any further funds that might arise from the testator's estate, when sold and brought into Court; and after payment of these costs, the decree directed that the Accountant General should pay the incumbrances, debts, and legacies out of the same funds, as far as they would go; and in case, after payment of all these charges, any surplus should remain, the same was to be divided into two portions, one of which was to be paid to the defendant, *Philpot*, the plaintiff in that suit, as the personal representative of the original plaintiff, *Jane Carter*, who was entitled to the same as one of the next of kin.

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It appeared in evidence, that the bill of costs of Mr. *Jones*, the first solicitor employed by *Jane Carter* in that suit, and the bill of costs of the plaintiff, Mr. *Smedley*, had been placed before the Master, by Mr. *Johnson*, the then solicitor, along with his own bills, and the whole together had been taxed at the sum of 678*l.* and that the fund in Court, with the addition of certain sums since paid by the receiver, was not sufficient to satisfy all the claims of different parties to the suit for costs. It was clear, however, that if all the taxed bills were reduced rateably, a certain amount, it was said 186*l.*, would be ascribed to the bill of the plaintiff. Mr. *Johnson*, the solicitor, received the rateable portion due upon taxation of the bills presented by him, and some further payments from the receiver, and would have paid the plaintiff *Smedley* his portion, had not the defendant, as he alleged, prevented him, by stating that *Smedley* had an action pending against him. He had therefore paid, by the plaintiff's desire, to another solicitor of the name of *Jones*, who had preceded Mr. *Smedley* in the suit, the surplus of what satisfied his own bill out of the monies he had received from the Accountant General, and as he said, had accounted to the defendant for the payments since made by the receiver. Whether, by accounting to him, he meant that he had paid the money to him, or paid it to others by his order, did not appear; but it appeared that since the date of the agreement, 12th of *December*, 1834, *Johnson* had received two sums from the receiver, amounting to 84*l.* 8*s.* 8*d.*

Upon this state of facts, the plaintiff's counsel contended that such portion of the funds which Mr. *Johnson* had received for costs under the decree, as was the rateable portion of the taxed costs of the plaintiff, were assets of *Jane Carter*, and were in the hands of the defendant, because the receipt of his attorney was his receipt. I thought that, under the circumstances of this case, Mr. *Johnson* received this money on behalf of the plaintiff, Mr. *Smedley*, and not on behalf of the defendant; and that being no part of the testator's, *Jane Carter's* estate, nor a sum to which she had any claim or title, it was not assets in her executor's hands; and directed a nonsuit, to set aside which, this rule has been granted.

It is very true, that the plaintiff is fairly entitled to have the benefit of that portion of the taxed costs which is ascribable to his bill; but the question whether that sum was assets of the testatrix in the hands of the defendant, is not to be tried by that criterion; but it is to be decided in the same manner and upon the same principles, as if any other creditor of the testatrix had brought an action against him as executor, and, upon a plea of no assets, had given these facts in evidence to prove assets. If, for example, a creditor on a bond had brought an action against the defendant as executor: if this sum be not assets, such bond creditor, upon a plea of no assets, would not have been entitled to a verdict; but if this sum be assets in the executor's hands, then he would be entitled to a verdict, even though Mr. *Johnson*, the solicitor, had paid the whole sum to Mr. *Smedley*, as he ought to have done. The executor could neither protect himself by a plea of no assets, nor by a plea of *plene administravit*, as he could not justify the payment to *Smedley*, a creditor by simple contract, whilst the bond remained unsatisfied.

It has been contended, that the decree in this case, directing costs to be paid to the plaintiff's solicitor, is like a judgment at law, which includes the costs as part of the debt recovered, though the plaintiff may not have paid the costs taxed to his attorney. In that case, it cannot be denied that all the money due upon the judgment is a debt due to the plaintiff; nor, if he dies

that his personal representative alone could have a *scire facias* upon the judgment; nor that the sum received by him upon that judgment, including the unpaid costs of the attorney, would be assets of the deceased in his hands. And it has been said, though the testatrix did not pay the costs, yet, by the decree of the Court, she or her executor became entitled to receive them, as if she had paid them.

Now, if this had been a decree in favour of the testatrix, with costs to be paid by the defendants in equity to her executor, as between party and party, there might be some analogy to the case of a judgment at law; but this is the case of a suit to administer the estate of a person deceased, in which there are, properly speaking, no hostile parties. In such a suit, the Court first makes a decree that the personal representatives of the deceased shall come to an account before the Master. Upon the Master's report, or upon the answer, if the funds are admitted, the Court orders the funds in hand to be brought into Court, and when all proper parties are before the Court, and all claims are duly investigated and ascertained, a final decree is made for the distribution of the funds. It is most usual in such cases to direct that the costs of all parties, shall be taxed as between attorney and client, and paid out of the corpus or fund in Court, or within the controul of the Court; but it is by no means necessary, or a matter of duty, that the Court should do so. Costs of all kinds are in the discretion of a Court of equity. No party has any right or interest in them, till the order of the Court is pronounced, and then the costs are to be paid to a person designated to receive them by the order or decree. The Accountant General can pay them to no other person. If they are ordered to be paid to the plaintiff's solicitor, he cannot pay them to the plaintiff; and *vice versa*, if to the plaintiff, he cannot pay them to the solicitor. Moreover, the Court will permit any solicitor in the suit or party, on motion or by petition, to suggest the interest he may have in any order or decree the Court may be disposed to make regarding costs. For example, in a long pending suit, where there have been several solicitors, or several successive parties, the Court will hear applications from the solicitors, or from the representatives of deceased parties, for the purpose of modifying the decree for costs, so as to prevent their falling into hands not entitled to them. If a solicitor has given up the suit without receiving his costs, and does not choose to trust his successor, the Court will allow him, on petition, to intervene, so as to make the costs due to him, payable to him only, and not to the party or his present solicitor. Or, if the bill of that solicitor has been paid by the existing party, or by a deceased party, whose personal representative he is, the Court will, upon a proper suggestion direct that portion of the costs to be paid to the party himself, whilst the remainder is paid to his solicitor.

In the case now in question, it is clear that Mr. *Smedley* delivered up the papers in the suit to Mr. *Johnson*, without payment of his bill by *Jane Carter*, but, instead of intervening before the final decree, by a petition, that the costs if any should be allowed, might *pro tanto*, be paid to him, his bill was laid by Mr. *Johnson* before the Master, as well as Mr. *Jones's*, the first solicitor, to be taxed, together with his own, as the costs, not of the plaintiff Mr. *Philpot*, but of all the plaintiff's from first to last in the suit; and the decree directed that, when taxed, they should be paid, not to the plaintiff in equity, but to Mr. *Johnson*. A court of equity, in suits of this nature, when it thinks

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proper to direct the costs out of the fund in Court, is especially careful of the interest of the solicitor, and will therefore always direct the costs to be paid to him, unless upon some special application, it should appear that he has been already paid, in which case, the costs so paid to him are directed to be repaid out of the fund to the party. This very decree furnishes an example of that nature, where one of the accounting parties having paid 18*l.* to Mr. *Smedley*, upon some incidental proceeding, is directed to deduct that sum from the money he is to bring into Court.

The question then is, in what capacity did Mr. *Johnson* receive that part of the costs which were taxed in respect of the plaintiff, *Smedley's* bill. That he did not receive it as his own, is quite clear, that he made use of the materials and documents of Mr. *Smedley* to obtain it, is quite clear, and it is equally clear that he used those materials and documents for that purpose by Mr. *Smedley's* authority.

It appears to me, therefore, that he received the money to the use of Mr. *Smedley*, without whose authority, expressed or implied, he could not have received it at all. The fallacy of the argument on the other side, appears to turn upon the supposition, that *Jane Carter, the deceased, had in her life time some sort of interest* in these costs, because she was indebted to her attorney in respect of them, and that this interest became vested in the plaintiff as her personal representative. But she had no such interest, she had no inchoate right to costs out of the fund in Court: it was purely in the judge's discretion whether the costs incurred by her should be paid out of that fund, or not paid at all; or even whether the costs of other parties should not be paid by her, or out of her assets, if she had any. It could not, therefore be said, till the Chancellor pronounced his decree, that any person had a right to receive those costs, or an inchoate interest in them. As *Jane Carter* had no such right or interest, none such could vest in her personal representative. If she had actually paid Mr. *Smedley's* bill in her life time, or if the executor had paid it out of her assets, he might have received the amount, at the discretion of the Chancellor, to replace that part of her estate, by an order to have them paid to himself; or, if he permitted the order to be so made, to pay them to his solicitor. Mr. *Johnson* would, in that case, have received them to his use as executor, and been liable to account to him for them. Then, indeed, the amount of those costs, when paid either to the executor or his solicitor, would have been assets of *Jane Carter* in his hands; not upon the ground that they were a debt due to her, or that she had left to him any claim or interest which she had in them, but because it pleased the Chancellor to order that the portion of her estate which had been so expended, should be replaced out of the funds to her executor. But as neither he or *Jane Carter* had ever paid these costs, Mr. *Johnson*, who alone could receive them from the Accountant General under the decree, held them for the person who was entitled to them, and that person was Mr. *Smedley*, for whose use the Chancellor intended them to be paid. Perhaps the best mode of illustrating this argument is, to suppose that the facts as they here appear had been brought by a petition from the defendant *Philpot* before the Chancellor stating that part of the costs of the plaintiff in the suit consisted of a bill still due to Mr. *Smedley*, a former solicitor in the suit, and praying that his bill should, when taxed, be paid, to enable him to satisfy Mr. *Smedley*. What, in that case, would the Chancellor have done?—He must either have made the order

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to pay the amount of that bill to Mr. *Smedley*, or to pay it to the plaintiff, that he might therewith discharge *Smedley's* bill, that is, to the use of *Smedley*. There would have been an appropriation of the sum by the very terms of the order which directed it to be paid. In that case, would this sum have been assets of *Jane Carter*, or would the executor have been bound to pay a bond creditor of her's in preference to Mr. *Smedley*? The case, though different in form, is substantially the same. The very object and design of the decree, that the costs shall be paid to the plaintiff's solicitor in the suit in equity, is, that those costs before they come to the hands of the party, shall be appropriated to the discharge of all the unsatisfied bills which have been taxed. It is the pleasure of the Chancellor that all the costs shall be paid out of the fund before it is divided, and it is also his pleasure to direct that for that purpose the amount of the taxed costs shall be paid to the solicitor. The solicitor, therefore, receives it, not as part of the debt due to his client, or as a claim in which his client, *not having paid any costs*, has any interest, but for the purpose of satisfying all the costs which have not been paid, and exonerating his client therefrom.

Let me suppose that Mr. *Johnson* had, with or without the consent of the defendant, paid to Mr. *Smedley* the portion of the costs due in respect of the claim, and that afterwards a bill in equity should be filed by a creditor, to take the accounts and administer the estate of *Jane Carter*, and that she had specialty as well as simple contract creditors. I desire to ask whether the Chancellor would charge the executor with this payment, as a mis-application of the testator's estate, to satisfy a simple contract creditor, before the debts on specialty were discharged? It appears to me, that it would be quite impossible he should do so, and that in answer to an application for that purpose, he could not say otherwise than that, *Jane Carter* never having paid these costs, the decree was not made for the purpose of discharging any debt due to her, for none was due, nor to replace any sum which she had expended in costs, for she had expended nothing, but substantially, if not specifically, to be applied in the payment of the bills of the solicitors, from first to last, which had not been paid. Again, suppose that *Philpot*, having no assets of *Jane Carter*, had paid Mr. *Smedley's* bill with his own money, can it be doubted that he would have had a right in that case to repay himself out of the sum received by *Johnson* for these costs? and yet if that sum could be considered assets in his hands, it is clear that as against a specialty creditor of *Jane Carter* he could not have discharged himself, because *Smedley* was a creditor by simple contract only; and if an executor pays with his own money a creditor by simple contract, though he shall be allowed this, and repay himself out of the assets, as against creditors of the same degree, yet he cannot apply the assets, when he receives them in that manner, as against a creditor, by specialty. Again, the payment or accounting by Mr. *Johnson* to Mr. *Philpot* appears to me to make no difference in this case. If Mr. *Smedley* had commenced an action against *Philpot* for this money, it appears to me that *Johnson* might have defended himself by shewing the facts, that he had received the money on account of a bill of *Smedley* which had never been paid, and that he was accountable to him for it; and if *Johnson* might have made such a defence, the voluntary payment made to the defendant does not exonerate him from Mr. *Smedley's* claim.

Upon these grounds I retain my opinion that a nonsuit was right; not

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because the money ought not to have been paid to Mr. *Smedley*, but because I think it was in effect appropriated by the order, and the circumstances of the case, to him, and did not, therefore, form any part of *Jane Carter's* assets.

Rule absolute for a new trial.

DOE, on the several demises of **JOHN LITTLEWOOD**, and **CHARLOTTE** his Wife, and **WILLIAM MASSON** and **JULIA** his Wife,
v. ELIZABETH GREEN.

Devise of real estates to *A.* and *B.* "equally between them, to take as jointtenants, and their several and respective heirs and assigns for ever." Held, that the devisees took an estate for life as joint tenants, with remainder to each of them as tenants in common in fee, after the death of the survivor.

EJECTMENT by the lessors of the plaintiff, to recover a moiety of certain lands. It was agreed, that the opinion of this Court should be taken upon a case stated under 3 & 4 Will. 4, c. 42, s. 25. The testator, *John Newham*, after devising his house and land, at *Whittington*, to his brother and nephew, for their respective lives, gave and devised the same to his nieces, *Elizabeth*, the wife of *John Green*, and *Jane*, the wife of *William Pearson*, "equally between them, to take as joint tenants, and their several and respective heirs and assigns for ever." *Elizabeth Green* and *Jane Pearson* took possession of the premises after the death of the deviser and the two tenants for life. *Jane Pearson* and her husband died, leaving two children, *Charlotte* and *Julia*, them surviving. *Charlotte* is the wife of the lessor of the plaintiff, *John Littlewood*, and *Julia* is the wife of the other lessor of the plaintiff, *William Masson*, and they claim one moiety of the *Whittington* estate, as co-heiresses of *Jane Pearson*, as tenants in common; alleging that the words, "to take as joint tenants," ought either to be rejected, as repugnant to the testator's intention, or to be construed as merely indicating the mode in which he intended the devisees to hold and enjoy their estates.

The defendant *Elizabeth Green*, the widow of *John Green*, has entered into possession of the estate in question, as sole tenant by survivorship, contending that a joint tenancy in fee or for life was created by the above limitation.

If this Court should be of opinion that *Jane Pearson* and *Elizabeth Green* took the estate in question as tenants in common in fee, judgment was to be entered for the lessors of the plaintiff; but if the Court should think that *Jane Pearson* and *Elizabeth Green* took the estate as joint tenants in fee or for life, judgment is to be entered for the defendant.

Sir *John Campbell*, A. G., for the lessors of the plaintiff.—The lessors of the plaintiff contend, that *Elizabeth Green* and *Jane Pearson* took as tenants in common in fee, with several inheritances, and not as joint tenants in fee or for life, with several inheritances. That an estate of the latter description is known to the law, appears from *Littleton*, Pl. 283; but it is contended, that this will cannot receive a proper construction, unless one of the limitations be omitted; and, as words of severance are used, and the law always favours a tenancy in common, the words "to take as joint tenants," may very properly be rejected. In 2 *Sheppard's Touchstone*, ch. 23, p. 445, it is said, "If one devise his land thus: 'I give to *I. S.* and *I. D.*, and their heirs, my land in

Dale, equally; or, my land in *Dale*, to be equally divided,' the devisees are tenants in common," *Lewen v. Cox* (a). So a devise of lands "unto *M. R., G. R., and T. R., equally*," was held to create a tenancy in common, *Denn v. Gaskin* (b). In *Laashbrook v. Cock* (c), it was decided that a devise to *A. and B.* "between them," constituted a tenancy in common. The same construction was given to the word "respectively," in *Torret v. Frampton* (d). There the devise was to the "wife for her life, the remainder to *A., B., and C., and their heirs respectively*, for ever." And again, where two-thirds of a residue were bequeathed "to and amongst" the children of *A. and B.*, it was determined that the children took as tenants in common. The effect of the words, "to take as joint tenants," may be obviated, by considering that they occur in a will, in which case, if not used in a technical sense, they may be construed according to the intention of the testator. Here the testator must have intended that *Elizabeth* and *Jane* should occupy the estate jointly, and not divide it. In *Ettricke v. Ettricke* (e), there was a devise of the profits in trust for six children, "to be distributed among them in joint and equal proportions," and it was held a tenancy in common. In *Perkins v. Baynton* (f), it was decided that a money legacy to two persons, not executors, was not a joint tenancy, but a tenancy in common, the words having the same meaning as "to be equally divided between them."—[*Parks, B.*—In that case there could not be a limitation to enjoy the legacy for a certain time; it was necessary to pay it absolutely to some one.]—*Haws v. Haws* (g), was there cited to shew, that where words are so inconsistent that they cannot be reconciled, the Court must reject those which are least consistent with the intention of the testator. The testator did not intend that the survivor should have the whole estate, for he uses the word "heirs," which must mean the heirs of each. The case of *Marryat v. Townly* (h), was a devise to trustees, as soon as the testator's three daughters attained their respective ages of twenty-one, to convey to them and the heirs of their bodies, as joint tenants; it was decided that this was not a joint estate. And Lord *Hardwicke* held, that where there were legal technical words in a will inconsistent with other words in the will, which could not have their proper effect, that he was bound to give them their effect *ex pres*, agreeably to the intention of the testator. In *Blisset v. Cranwell* (i), the devise was to *A. and B.*, and their heirs, and the survivor of them, equally to be divided between them and their heirs; the word "survivor" was disregarded, and it was held there was a tenancy in common. *Turkerman v. Jeoffrys* (j), which may be cited on the other side, is in favour of the lessors of the plaintiff, since it shows that the intent of the deviser is the rule for the construction of wills, *Barker v. Giles* (k), and *Doe v. Abey* (l), are not to be considered as authorities against the lessors of the plaintiff. Nor is the dictum of *Hale, C. J.*, in *King v. Melling* (m), that "a devise to two, equally to be divided between them, and to the survivor of them, makes a joint tenancy," to be deemed an authority against the lessors of the plaintiff, since

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(a) Cro. Eliz. 695.

(b) Cowp. 657.

(c) 2 Meriv. 70.

(d) Styles, 434.

(e) Amb. 656.

(f) 1 Brow. C. C. 118.

(g) 3 Atk. 524.

(h) 1 Ves. Sen. 102.

(i) 1 Salk. 226.

(j) Holt, 370.

(k) 2 P. Will. 280; 9 Mod. 157.

(l) 1 M. & Sel. 428.

(m) 1 Vent. 216.

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he adds, that that rule depends "upon the express import of the last words."

Kelly, contrd.—In this case, *Jane Pearson* and *Elizabeth Green* took an estate of joint tenancy for their lives, with several inheritances in fee after the death of the survivor. The rule of law is, that effect is to be given to all the words of a will, unless there is some repugnancy between them. The lessors of the plaintiff require the Court to strike out the words "joint tenants," but that is unnecessary, since those words, together with the rest of the sentence, are capable of a strictly legal construction. Many cases have been cited in support of the proposition, that words of severance are to be construed as creating a tenancy in common; but that rule obtains only where there are no words of a contrary tendency. That was the case in *Ettricke v. Ettricke*, where the words, "joint and equal proportions," could mean nothing else than that the profits were to be divided. The same argument applies to *Perkins v. Baynton*. In *Marryat v. Townley* the will was held to create a tenancy in common, in spite of the words "joint tenants," which occurred at the close of the sentence. But the ground of that decision was, that the other objects of the will, particularly the clause entitling the daughters, on arriving at twenty-one, to demand a conveyance of their shares, would otherwise have been frustrated. Besides, the Chancellor there relies on the devise being to trustees, who were under the controul of his Court. That case, moreover, was determined at a time when it was not so clearly settled as at present, that technical words are to have their legal effect, unless it be clear that they are not used in their technical sense, and that the general intention of a testator is not to override and destroy the meaning of particular words, *Doe, d. Gallini v. Gallini* (n), *Jesson v. Wright* (o).—[*Alderson, B.*—The same rule was acted upon by this Court in *Lees v. Mosley* (p).]—The only difficulty here is created by the words "several and respective;" for if the devise had stopped at the words "joint tenants," the case would have resembled *King v. Melling*. On the whole, it is submitted that the testator's nieces were joint tenants for the term of their life, and tenants in common of the inheritance in fee.

Sir John Campbell, A. G., in reply.—It is now admitted that the words "several and respective heirs and assigns," are not to be struck out, and that they create several inheritances. That being the case, the Court will not presume a joint tenancy of the kind contended for by the defendant; for although it is possible to create such an estate, still as the testator has not shown a clear intention of doing so, the law will not assist him to create it. It is also admitted that technical terms are to receive their full meaning; in that case, the word "equally," being a technical word, must be construed to create a tenancy in common. The lessors of the plaintiff do not require the Court to strike out any words, but merely to decide that the testator intended his nieces to hold the land without dividing it; and that his words intimate the mode of enjoyment, and not the quality of the estate.

Cur. ad. vult.

(n) 5 B. & Adol. 621.
 (o) 2 Bligh, 51.

(p) Yo. & Coll. 589.

Lord ABINGER, C. B.—This was a special case, in which the question turned on the construction of a passage in the will of *John Newham*. *Elizabeth Green*, the defendant, and *Jane Pearson*, the mother of the two female lessors of the plaintiff, were the nieces of the testator. By his last will and testament, made in 1799, after devising certain estates comprised in the declaration in this ejectment for certain lives, which have become extinct since his death, he gave and devised the same to his nieces *Elizabeth Green* and *Jane Pearson*, *equally between them, to take as joint tenants, and to their several respective heirs and assigns for ever.*

Both the nieces were living at the time of the testator's death, but when the last tenant for life died, *Elizabeth Green*, the defendant, had survived *Jane Pearson*, whose heirs-at-law at that time were her two daughters, the lessors of the plaintiff. *Elizabeth Green* took possession of the whole estate as surviving devisee, claiming a joint tenancy with her sister. The lessors of the plaintiff claim as heirs of *Jane Pearson*, who, as they insist, took an estate of inheritance, as tenant in common with her sister.

The question then is, what estates the two nieces, *Elizabeth Green* and *Jane Pearson* took under the devise to them?

For the lessors of the plaintiff, it was contended, that the words, *equally between them*, and the words, *their several and respective heirs and assigns*, had always been construed to make a tenancy in common; and many cases were cited, and not controverted, to prove that position, and further, to shew that where other words had been used along with these, more apt to describe a joint tenancy, yet the Courts had rejected them, and given effect to the words which implied a tenancy in common.

For the defendant, on the other hand, it was contended that no case could be found where the Court had rejected so plain a declaration as the present, that the devisees should take expressly as joint tenants; that therefore, if any words ought to be rejected, they were the words which were less plain and unambiguous, from which a tenancy in common was only to be inferred; that therefore the devisees took an estate as joint tenants in fee, or at least as joint tenants for life, with remainder to their heirs in common.

The Court, however, cannot consider the words "heirs and assigns" in this will, as any other than words of inheritance, denoting the nature of the estate taken by the devisees themselves.

But we are of opinion that due effect may be given to all the words in this devise, by deciding that the devisees, the nieces, took an estate for their joint lives, and the life of the survivor, that is, as joint tenants, with remainder to each of them as tenants in common in fee, after the death of the surviving life; in other words, that they took as tenants in common in fee, subject to an estate for their joint lives, and the life of the survivor. The authority for this construction is to be found in *Littleton's Tenures*, sec. 283, in which it is said, that "If lands be given to two men, and to the heirs of their two bodies begotten; in this case the donees have a joint estate for term of their two lives, and yet they have several inheritances; for if one of the donees hath issue and die, the other, which surviveth, shall have the whole by the survivorship, for the term of his life; and if he which surviveth hath also issue and die, then the issue of the one shall have the one moiety, and the issue of the other the other moiety of the land; and they shall hold the land between them in common, and they are not joint tenants, but are tenants in common.

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And the cause why such donees in such case have a joint estate for term of their lives is, for that at the beginning the lands were given to them two, which words, without more saying, make a joint estate to them for term of their lives. For if a man will let land to another, by deed or without deed, not making mention what estate he shall have, and of this make livery of seisin; in this case, the lessee hath an estate for term of his life; and so, inasmuch as the lands were given to them, they have a joint estate for term of their lives. And the reason why they shall have several inheritances is this, inasmuch as they cannot, by any possibility, have an heir between them, engendered as a man and woman may have, &c., the law wills that their estate and inheritance be such as is reasonable, according to the form and effect of the words of the gift, and this is, to the heirs which the one shall beget of his body by any of his wives; and to the heirs which the other shall beget of his body by any of his wives, &c., as it behoveth by necessity of reason that they shall have several inheritances. And in this case, if the issue of one of the donees, after the death of the donees, die, so that he have no issue alive of his body begotten, then the donor or his heir may enter into the moiety as in his reversion, &c., although the other donee hath issue alive, &c. And the reason is, forasmuch as the inheritances be several, &c., the reversion of them in law is several, &c.; and the survivor of the issue of the other shall hold no place to have the whole."

It appears, from the reasoning of *Littleton*, that the words "heirs of their two bodies," must of necessity give separate inheritances, because they can mean, in the case put, nothing else but their *several* and *respective* heirs of the body. And if an estate tail in common may be given by such words denoting the several heirs of the body, there is no reason why an estate in fee in common may not be given by the like words, denoting the heirs general, as in the present case.

Accordingly, we find an express authority for words of a similar import giving an estate for life to two, as joint tenants, with an estate in fee to them as tenants in common, subject to the joint estate for life, in 2 *Peere Williams*, 280, *Barker v. Giles*; and the same case in 3 *Brown's P. C.* 297, where the judgment of Lord *King* was affirmed by the House of Lords. That was a case of a devise of lands, to be sold for the payment of debts and legacies, and the surplus to be laid out in lands, to be settled to the use of the testator's two nephews, *Robert* and *Jerome Barker*, and the *survivor of them, and their heirs and assigns for ever, equally to be divided between them, share and share alike.*

We are of opinion, therefore, in the present case, as Lord *King* was in that, that the devisees took an estate for their joint lives, and the life of the survivor, upon the expiration of, or subject to which they took estates in fee simple, as tenants in common. The ejectment, therefore, cannot be maintained during the life of *Elizabeth Green*, and there must be judgment for the defendant of *non pros.*

Judgment for the defendant.

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INFORMATION against the defendants for non-payment of probate duty.

At the trial before Lord *Abinger*, C.B., at the Sittings after *Hilary Term*, a special verdict was taken by consent, which stated the following facts:—*Mary Pelham*, on the 26th *March*, 1836, made her last will and testament in writing, duly executed, and thereby devised and bequeathed all her estate and effects, goods, and chattels, and all her property of every nature and kind whatsoever, to certain persons in the said will mentioned, and also nominated and appointed *Theodore Bouwens*, *Eliza Penelope Bouwens*, and *Christopher Hodgson*, to be executors and executrix thereof. The said *Mary Pelham* afterwards, on the 30th *March*, 1837, died without revoking or altering her said will, and the said *T. Bouwens*, *E. P. Bouwens*, and *C. Hodgson*, on the 27th *April*, 1837, proved the said will in the Prerogative Court of *Canterbury*, and took upon themselves the execution thereof. The said *Mary Pelham* was, at the time of her death, and for three years next preceding that event, resident in *Connaught-place*, in the parish of *Paddington*, in the county of *Middlesex*, and within the jurisdiction of the Prerogative Court, and at the time of her death she was possessed of personal estate and effects to the amount of 38,509*l.* 3*s.* 1*d.*, a large part of which said personal estate and effects, amounting to the sum of 7,377*l.* 13*s.* 7*d.*, was and is as follows; that is to say, 880*l.* 2*s.* 9*d.*, parcel of the said last-mentioned sum, was and consisted of six written instruments, called *Russian* bonds, and of certain other written instruments thereto attached, and called dividend warrants, whereof, at the time of her death, she was the holder. The residue of the sum of 7,377*l.* 13*s.* 7*d.* consisted of certain *Danish* and *Dutch* bonds. [The forms of these bonds were respectively set out.]

The said *Russian*, *Danish*, and *Dutch* bonds respectively were and are, and always have been, marketable securities within this kingdom, and were and are, and always have been sold and transferred within this kingdom, by delivery only, and the bearers thereof respectively have always been deemed and reputed to be, and have always been dealt with as being legally entitled to the principal monies secured by the said bonds respectively, and to the interest from time to time accruing in respect of the same. It has never been, or is necessary to do or perform any act whatever out of the kingdom of *England* in order to render a transfer of any of the bonds valid; and the bearers of the said bonds respectively have always been dealt with by the agents of the empire of *Russia*, and of the kingdoms of *Denmark* and *Holland* respectively, as the persons duly entitled to the principal monies secured by the said bonds respectively, and the interest or dividends from time to time accruing in respect of the same; and such agents have always paid all monies due and payable for or in respect of the said bonds respectively, according to the tenor and effect thereof, to the bearers of the same. In regard to the *Danish* and *Russian* bonds, there hath always been, in the kingdom of *England*, a lawfully authorized agent of the empire of *Russia* and of the kingdom of

A testatrix died, being in possession of foreign bonds, which, at the time of her death, were in the province of *Canterbury*. The bonds were marketable securities within this kingdom, transferable by delivery only, and no act out of the kingdom was necessary to render their transfer valid. Held, that probate duty was payable in respect of them; and that they were assets to be administered within the province of *Canterbury*.

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Denmark respectively, for the purpose of paying the interest or dividends from time to time accruing in respect of the same bonds respectively to the bearers thereof; but as to the said *Dutch* bonds, there is not, nor ever has been in this kingdom, a lawfully authorized agent of the kingdom of *Holland*, for the purpose of paying the dividends or interest from time to time arising in respect of the said *Dutch* bonds, but such dividends or interest are payable solely at *Amsterdam*. No part of the principal money secured by the said bonds has as yet been paid upon any of the said bonds to the holders thereof, but all the dividends or interest accruing in respect of the said bonds have been regularly paid to the holders thereof in due manner.

The said *Mary Pelham*, at the time of her death being so possessed of the said *Russian*, *Danish*, and *Dutch* bonds, to the amount of 7,377*l.* 13*s.* 7*d.* as aforesaid, the said bonds, at the time of her death, were at her residence, and within the jurisdiction aforesaid; and immediately after her death the said bonds came into the possession of the said *T. Bouwens*, *E. P. Bouwens*, and *C. Hodgson*, as being part of the personal estate and effects of the said *Mary Pelham*, together with the residue of her said personal estate and effects. And the said *T. B.*, *E. B. P.*, and *C. H.*, as such executors and executrix, afterwards, and without doing or causing to be done any act out of the kingdom of *England*, or out of the jurisdiction of the Prerogative Court, sold and delivered them to certain persons to the jurors unknown, and received, as the price of and for the said bonds, certain monies, amounting to the said sum of 7,377*l.* 13*s.* 7*d.*

And the said *T. B.*, *E. B. P.*, and *C. H.*, upon the occasion of proving the will of the said *Mary Pelham*, made oath that the estate and effects of the said *Mary Pelham*, which she in any way died possessed of or entitled to, and for and in respect of which probate of the said will was to be granted, were under the value of 35,000*l.*, to the best of the knowledge, information, and belief of them the said *T. B.*, *E. B. P.*, and *C. H.* And the said *T. B.*, *E. B. P.*, and *C. H.* then duly paid the sum of 450*l.* for the duty payable in respect of the said sum of 35,000*l.*

No duty has been paid upon the sum of 7,377*l.* 13*s.* 7*d.* vested in the said bonds, and the said *T. B.*, *E. B. P.*, and *C. H.* have refused to pay the probate duty claimed in respect thereof.

The points marked for argument on the part of the crown were these:

The Attorney General claims the payment of duty, under the 55 *Geo.* 3, c. 184, schedule part 3, tit. "Probate;" and will contend that the facts disclosed on the special verdict, shew that the said *Russian*, *Danish*, and *Dutch* bonds, therein mentioned, were respectively liable to probate duty in the hands of *T. B.*, *E. B. P.*, and *C. H.*, executors and executrix of *Mary Pelham*; because, at the time of the decease of the said *Mary Pelham*, the said bonds respectively formed part of the personal estate and effects of the said *Mary Pelham*, within the jurisdiction of the Prerogative Court of *Canterbury*, by which Court probate of the will of the said *Mary Pelham* was granted.

The points for argument, on behalf of the defendants, were as follows:

The defendants intend to argue, that probate duty is not payable in respect of any or either of the securities mentioned in the special verdict. That such securities being evidence only of debts due to the testator's estate, from debtors out of the jurisdiction of the Spiritual Court, are not any estate or effects within the meaning of the Statute 55 *Geo.* 3, c. 184, or any other Act

or provisions relating to the payment of the probate duty. That such securities must, in reference to such duties, be taken as, and deemed to be, property in a foreign country, and only legally available there.

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Sir *R. M. Rolfe*, S. G., for the Crown.—The question before the Court is, whether this case is governed by the decisions in *The Attorney General v. Dimond (a)*, and *The Attorney General v. Hope (b)*. In the first of these cases, the testator, at the time of his death, was the holder of *French rentes*; and in the latter, the testator was owner of a certain amount of *American stock*; and it was held, that that property was not liable to probate duty, on the ground of its not being within the jurisdiction of the Court of Probate, it being receivable and transferable in *France* and *America* only. But the present case is clearly distinguishable from those cases, for all these bonds are marketable securities in this country; they are transferable here by delivery, they are payable to the bearers, who are always considered entitled to the principal monies secured by them, and to the interest due in respect of them; nor is it necessary to do any act out of this kingdom to render their transfer valid. Suppose an action to be brought against these executors, and *plene administraverunt* pleaded, and at the trial administration is proved of all the property, except these bonds, which were converted into money by the executors after the death of the testatrix, would the plea be supported? Or, suppose these bonds to be in the hands of a banker, who refuses to deliver them, and the executors bring *trover* for them, could they recover, as executors, under a probate, when no duty had been paid in respect of this property? Or, suppose the bonds had been sold by the banker, and *trover* had been brought for damages; to allow the executors to recover damages, would be to allow them, by means of a probate, to recover property, in respect of which no duty had been paid. The case of *Hunt v. Stevens (c)*, decides that an administrator, who shews that he sues for a greater value than is covered by the *ad valorem* stamp of his letters of administration, shews his administration to be void, and cannot recover. The present case is easily distinguishable from *The Attorney General v. Dimond*, and *The Attorney General v. Hope*, since in those cases certain important acts were necessary to be done in a foreign country to enable parties to get possession of the property; but here no step need be taken out of this kingdom to give validity to the transfer of these bonds. It was also urged in the latter of those cases, that, as property situated in a foreign country might be liable to duty there, to compel the payment of duty in this country, would be forcing the executors to pay it twice over; but in the present case the bonds are marketable in this country, they are transferable by delivery here, and in all respects resemble personal chattels, which are capable of being converted into money. The authority of *Gorgier v. Mievill (d)*, will not be disputed. It was there held that *Prussian* bonds, which resemble the present instruments, might be pledged by an agent, in whose hands they were placed for a special purpose, and that a party so taking them in ignorance that the agent was not the real owner, might acquire a good title to them. The precise form of the instrument is of little importance; the material circumstance is, that it is capable of being con-

(a) 1 C. & J. 356.

(c) 3 Taunt. 113.

(b) 7 C., M. & Ros. 530; 8 Bligh. 44.

(d) 3 B. & Cres. 45.

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verted into money in this country. It would be sufficient if there were a mere piece of paper, provided it could be sold in the market, and transferred by delivery.—[*Parke, B.*—Your argument is, that foreign bills of exchange, payable here, in the possession of a testator at the time of his death, would be liable to probate duty.]—Undoubtedly they would, if transferable on delivery. That state of things must often have arisen with respect to *Irish* and *English* bank notes, the former of which circulate extensively at *Liverpool*, and the latter in *Dublin*. On these grounds, it is contended that the two cases referred to are capable of being distinguished from the present, and that judgment must be for the crown.

Sir *C. Wetherell*, for the defendants.—The decisions in *The Attorney General v. Dimond* and *The Attorney General v. Hope*, cannot be distinguished from the present case. What difference in substance is there between the present bonds and the *French* rentes and *American* stock? Probate duty depends upon locality; and property, to be subject to it, must be within the jurisdiction of the Court of Probate. Property from a distant part of the world, coming into the hands of an executor, is to be administered by him, but is not liable to probate duty. A judgment of the superior Courts of *Westminster* is *bonum notabile* in the province of *Canterbury*. So a bond is to be administered within the jurisdiction where it happens to be at the time of the testator's death. But it has always been held, that simple contract debts are not *bona notabilia* at the place where the creditor resides (*e*). Now, the certificates that have been granted in this case are not judgments nor specialties, nor have they locality in this kingdom. They resemble bills of exchange accepted by the financial officers of the foreign governments. Now, a bill of exchange has no locality at the place where the holder lives, because it is in the nature of a simple contract debt, *Yeoman v. Bradshaw* (*f*); although it has become negotiable by the custom of merchants. If, then, this property is considered liable to duty, the effect of such a decision will be to localize, within the province of *Canterbury*, debts that are payable abroad, whilst debts of a similar nature, owing in this country, are not held to be local. In *Byron v. Byron* (*g*), a judgment had been entered up in the superior Court for a debt due in *Devonshire*, and that circumstance was held to give locality to the debt. In *Hunt v. Stevens*, the goods were within the jurisdiction of the Prerogative Court; but here, the defendants contend that the property in question was never within the limits of the jurisdiction. That case, therefore, has no application. It is admitted that there is a title to these instruments under the will, but it does not therefore follow that there is any title under the probate, since that is governed by the rule of locality. It is, therefore, submitted, that this question is decided by the authorities of *The Attorney General v. Dimond*, and *The Attorney General v. Hope*.

Sir *R. M. Rolfe*, in reply.—The argument on the other side has been confined to a supposed analogy between this case and those which relate to *bona notabilia*; but in truth, the question is, whether these bonds have a locality

(*e*) Vin. Abr. Administration, (A.);
Com. Dig. Administration (A.) (B).

(*f*) Holt, 42; Carth. 392; 12 Mod.
107; 3 Salk. 70.

(*g*) Cro. Eliz. 472.

and a value in the place where they exist at the time of the testator's death. In *Yeoman v. Bradshaw* the action was against the drawer of the bill, who resided in *London*, the probate having been granted at *Durham*. It is quite clear, therefore, that as against him the plaintiff had no *locus standi*. The question of *bona notabilia* does not apply. The duty is claimed not on the ground of there being a foreign debt, but on the ground of the property being available in this country, being marketable here, and being locally situated within the jurisdiction of the Court of Probate at the time of the testator's death.

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Cur. adv. vult.

The judgment of the Court was now delivered by

LORD ABINGER, C. B.—The question in this case arose upon a special verdict, on an information against the executors of *Mrs. Pelham*. The point to be decided is, whether probate duty is by law payable upon the value of certain written instruments, called *Russian*, *Danish*, and *Dutch* bonds, which were the property of the testatrix, and were, at the time of her death, in the province of *Canterbury*. The special verdict gives a description of these instruments, which are called, though incorrectly, bonds, and finds that all these were marketable securities within this kingdom, transferred by delivery only, and that it never has been necessary to do any act whatsoever out of the kingdom of *England* in order to make the transfer of any of the said bonds valid. That there has always been an agent in *England* of the *Russian* and *Danish* government, to pay the dividends due on these bonds respectively, but the dividends on the *Dutch* bonds are payable solely at *Amsterdam*. All these instruments have been clearly framed with a view to their becoming subject of sale, and easily transmissible from hand to hand. The special verdict also finds, that all the bonds came to the possession of the executors as part of the testatrix's personal estate, and were sold and delivered by them, without doing any act out of the jurisdiction of the Prerogative Court, for 7,000*l.* and upwards, which they had received. By the 55 *Geo. 3*, c. 184, a certain duty is granted on probates, in proportion to the value "of the estate and effects, for or in respect of which such probate shall be granted;" and the law has been settled by the two cases of *The Attorney General v. Dimond*, and *The Attorney General v. Hope*, that the duty is to be regulated, not by the value of all the assets which an executor or administrator may ultimately administer by virtue of the will, or letters of administration, but by the value of such parts as are, at the death of the deceased, within the jurisdiction of the spiritual judge, by whom the probate, or letters of administration, are granted. The question is, therefore, whether these securities are to be considered as assets locally situate within the province of *Canterbury*, at the time of the testatrix's death. The two cases above cited decided that *French* rentes and *American* stock, which are part of the national debt of *France* and *America* respectively, and are transferrable there only, and debts due from persons in *America*, were not assets locally situate here. But it is here contended, and we think rightly, that the property, which is the subject of this inquiry, is distinguishable, and had a locality in *England*. Whatever may have been the origin of the jurisdiction of the ordinary to grant probate, it is clear that it is a limited jurisdiction, and can be exercised in respect of those

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effects only which he would have had himself to administer, in cases of intestacy, and which must, therefore, have been so situated as that he could have disposed of them in *pious usus*. As to the locality of many descriptions of effects, household and moveable goods for instance, there never could be any dispute: but to prevent conflicting jurisdictions between different ordinaries, with respect to choses in action and titles to property, it was established as law, that judgment debts were assets, for the purposes of jurisdiction, where the judgment is recorded; leases, where the land lies; specialty debts, where the instrument happens to be; and simple contract debts, where the debtor resides at the time of the testator's death. And it was also decided, that as bills of exchange and promissory notes do not alter the nature of the simple contract debts, but are merely evidences of title, the debts due on these instruments were assets where the debtor lived, and not where the instrument was found. In truth, with respect to simple contract debts, the only act of administration that could be performed by the ordinary, would be to recover or receive payment of the debt, and that would be done by him within whose jurisdiction it happened to be. These distinctions being well established, it seems to follow, that no ordinary in *England* could perform any act of administration within his diocese, with respect to debts due from persons resident abroad, or with respect to shares or interests in foreign funds payable abroad, and incapable of being transferred here; and therefore no duty would be payable on the probate or letters of administration in respect of such effects; but, on the other hand, it is clear that the ordinary could administer all chattels within his jurisdiction; and if an instrument is created of a chattel nature, capable of being transferred by acts done here, and sold for money here, there is no reason why the ordinary, or his appointee, should not administer that species of property. Such an instrument is, in effect, a saleable chattel, and follows the nature of other chattels as to the jurisdiction to grant probate. In this case, assuming that the foreign governments are liable to be sued by the legal holder, there is no conflict of authorities, for their governments are not locally within the jurisdiction, nor can be sued here; and no act of administration can be performed in this country, except in the diocese where the instruments are, which may be dealt with, and the money received by their sale in this country. Let us suppose the case of a person dying abroad, all whose property in *England* consists of foreign bills of exchange, payable to order, which bills of exchange are well known to be the subjects of commerce, and to be usually sold on the Royal Exchange. The only act of administration which his administrator could perform here, would be, to sell the bills, and apply the money to the payment of his debts. In order to make titles to the bills, to the vendee, he must have letters of administration; in order to sue in *trover* for them, if they are improperly withheld from him, he must have letters of administration. For even if there were a foreign administration, it is an established rule that an administration is necessary in the country where the suit is instituted, (*Story on the Conflict of Laws*, p. 421), and that these letters of administration must be stamped with a duty, according to the saleable value of the bills; the case of *Hunt v. Stevens* is an express authority. If this be the law in the supposed case, it is impossible to distinguish it from that under consideration. Here are valuable instruments in *England*, the subjects of ordinary sale; the debtors, by virtue of such instruments (if there are any) resident abroad, out of the jurisdiction of any

ordinary, and consequently there being no fear of conflicting rights between the jurisdictions who are to grant probate. If these were the only effects in *England* of the deceased (a supposition which would simplify the case), there would be no question as to the necessity of probate; not only to make title to them by sale to any one, who knew that they were the property of the deceased, or chose to inquire into the title, but certainly in order to sue for them against a wrong doer; against a banker, for instance, who had received them from the deceased, and refused to deliver them to the executor or administrator, and the probate must surely be stamped according to the value of the only effects which could be sold, disposed of, or recovered under it. And, if this be true, if they were the only effects, it must be true that the duty must be paid on their value, if they form part of the effects of the deceased. We think, therefore, that in this case these instruments are of the nature of valuable chattels, saleable here, and which can be administered here, and therefore, that their amount should be included in the value of the effects of the testatrix. The judgment, therefore, must be for the Crown.

Judgment for the Crown.

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IN THE EXCHEQUER CHAMBER (IN ERROR.)

LEVI v. LANGRIDGE.

IN this case a writ of error was brought on the judgment of the Court of *Exchequer*. (*Vide* 1 *M. & Hurl* 134; S. C. 2 *Mees. & W.* 519.) The case was argued on the 9th of *January*, 1838, by *Erle*, for the plaintiff in error, and *Bompas*, Serjt., for the defendant in error. For the plaintiff it was contended, that the circumstances did not fall within the principle of *Paisley v. Freeman* (a), (although so considered by the Court below), because there the representation upon which the action was founded, was made directly to the plaintiff; as was also the case in other authorities of the same description. *Haycraft v. Creasy* (b), *Foster v. Charles* (c), *Corbett v. Brown* (d), *Humphrey v. Pratt* (e), *Polhill v. Walter* (f), and *Lyde v. Barnard* (g), were referred to.

The father of the plaintiff purchased a gun at the shop of the defendant, and stated at the time that he purchased it for the use of himself and his sons. The defendant warranted, and represented that the gun was made by N., and was a good, safe, and secure gun. The plaintiff used the gun, which exploded and shattered his arm:—*Held*, that the action was maintainable, on the ground of fraud.

The judgment of the Court was subsequently delivered by

Lord DENMAN, C. J.—We agree with the Court of *Exchequer*, and affirm the judgment, on the ground stated by Mr. Baron *Parke*, “That as there is fraud, and damage, the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time, as one of its results, the party guilty of the fraud is responsible to the party injured.”

Judgment affirmed.

(a) 3 T. R. 51.

(b) 2 East, 105.

(c) 6 Bing. 396; S. C. 7 Bing. 105.

(d) 8 Bing. 33; 1 Mo. & S. 85.

(e) 5 Bli. N. S. 154.

(f) 3 B. & Ad. 114.

(g) 1 M. & W. 92; 1 Gale, 388

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Ball then applied for interest on the judgment from the time that execution had been delayed by the writ of error; and argued that section 30 of the Statute 3 & 4 Will. 4, c. 42, was imperative where judgment was given for the defendant in error; and the Court accordingly ordered it to be allowed, at the rate of 4l. per cent.

TRIAL AT BAR. TRINITY VACATION, 1838.

Before Lord ABINGER, C. B., PARKE, BOLLAND, and ALDERSON, Bs.

June 15.

LAYBURN and others v. CRISP and others.

Where a document has been put in by one party, and certain portions of it have been read at the desire of the opposite party, with a view to produce an effect upon the jury, it is too late for the latter party to object to its admissibility.

A decree of a Court of equity *in rem* referring to certain depositions, may be read in evidence, without the production of the depositions; but *semble*, that the depositions may be put in as the evidence of the opposite party.

THIS was an issue directed by *Alderson, B.*, from the equity side of the *Exchequer*, for the purpose of trying two questions. First, "Whether from time whereof the memory of man runneth not to the contrary, the deputy oyster meters of the city of *London* have had and exercised, and still of right ought to have and exercise, the exclusive right and privilege, by themselves or their servants, of measuring, shovelling, unloading and delivering, all oysters which have been or may be brought in any boat or vessel along the water of *Thames* for sale, to every place within the limits of the port of *London*, and to have and receive a reasonable compensation for so doing." And secondly, "whether the sum of eight shillings for every score for the first one hundred bushels, and four shillings for every score of bushels of the remainder of any cargo of oysters brought on board of any oyster vessel to any market within the limits of the said port of *London* for sale, or any other and what sum of money be a reasonable and proper recompence to the aforesaid deputy oyster meters for the labour of shovelling, unloading, and delivering out of the said oysters."

Counsel for the plaintiffs, Sir *F. Pollock*, *Thesiger*, *R. V. Richards*, and *W. Wood*; for the defendants, Sir *W. W. Follett*, *Platt*, *Willcock*, and *Channell*.

Sir *F. Pollock* put in evidence a decree of the Court of *Exchequer*, in the case of *Milburn v. Fisher*, bearing date May 13th, 1783. This decree directed an issue to try this question, "whether the sum of 8s. per score for the first hundred bushels, and 4s. per score for the remainder of the cargo on board each of the oyster vessels brought to *Billingsgate* market for sale, be a reasonable and proper recompence to the plaintiffs, the deputy day meters, for the shovelling, unloading, and delivering out the said oysters." The decree recited the bill and answer, and was drawn in the usual manner, upon hearing counsel, and reading the depositions and exhibits. The bill and answer were also put in, together with a decretal order of February 9th, 1784, which after stating that the issue had been found for the plaintiffs, directed an account to be taken. Certain passages were then read from the decree, at the instance of Sir *W. W. Follett*.

Sir *W. W. Follett* and *Platt*.—The plaintiffs are bound to read the depositions, as they form part of the record, and are referred to in the decree.—

[Lord Abinger, C. B.—The decree states that the depositions were read, and the counsel heard, but it neither recites the depositions nor the arguments of counsel.]—This decree is not like the verdict of a jury.—[Parke, B.—It is analogous to a verdict, and is admissible in the same manner. The Lord Chancellor is judge both of fact and law.]—The question here is, the existence of a certain custom. The object of putting in the decree is to shew that the equity judge was of opinion that the custom existed. The decree professes to be founded on the depositions and exhibits annexed: the latter are clearly admissible; and the former ought to be read, to enable this Court to see whether the question of the custom has been determined by this decree; for if no evidence of the immemorial appointment of deputy day meters be found upon the depositions, but merely evidence of the date of their appointment, it will be plain that the decree, which is founded upon these depositions, does not afford proof of a custom, and is therefore itself inadmissible. It follows, then, either that the decree is not evidence in the present stage of the cause, or if it be evidence, that the depositions should be read also. It does not follow, from the fact of an issue having been directed to ascertain the amount due to the day meters, that the equity judge was satisfied of the existence of the custom; and if no such custom appear upon the bill and answer, it is clear that he could not have formed any decision respecting it. The depositions form part of the record, and if they were produced, this Court would be able to determine the weight to which the decree is entitled.—[Alderson, B.—The depositions constitute part of the record, merely for the purpose of enabling the Court of error to decide upon the whole case.]

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Sir F. Pollock and Thesiger, *contra*.—The defendants' counsel are too late in objecting to the admissibility of this decree, after they have insisted upon the reading of a portion of it. The plaintiffs are not bound to produce the depositions, for they are not recited, but merely referred to in the decree. As well might it be contended that a rule of Court could never be proved without also proving the affidavits to which it refers; or that the plaintiffs would be bound to read the arguments of counsel, because they are referred to in the decree. On the same ground it might be maintained, that a verdict could never be proved, unless it were shewn on what evidence the jury formed their opinion. It is stated in *Buller's Nisi Prius*, p. 235, that "if a party wants to avail himself of a decree only, and not of the answer or depositions, the decree being under the seal of the Court and enrolled, may be given in evidence, without producing the bill and answer."

Sir W. W. Follett, in reply.—With regard to the lateness of the objection, the answer is, that until the decree is read, it is impossible to ascertain whether it will be necessary to insist upon the production of the depositions. The decree is silent as to the custom; it is therefore necessary to resort to the depositions, to discover whether the Court has formed any judgment upon the existence of a custom. In the case of a verdict being offered in evidence, it often becomes necessary, with a view to apply the judgment, to shew what was proved at the trial.

Lord Abinger, C. B.—Where it does not appear by the record what particu-

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lar custom is in dispute, it is the practice to shew, by the evidence given at the trial, what custom was in question. In *indebitatus assumpsit*, for example, the pleadings would give no information, and therefore it becomes necessary to shew what passed at the trial. The first question is, whether this decree is evidence at all. As to that point, I am not prepared to say that it may not be admissible as it stands, or that it may not be evidence *per se* of the facts stated in the bill and answer. As to the question, whether the party who puts in the decree is bound also to put in the depositions, I am of opinion that he is not so bound. Where a bill has been filed to perpetuate testimony, which a party wishes to use with the view of proving the custom, he must first prove the decree. But where a decree is in itself admissible, the evidence on which it was founded need not be previously read. To require the deposition to be produced in the present case, would be to make this Court sit in judgment on the decision of 1783. The decree in question is nothing less than the opinion of the equity judge, that certain rights were established; and into the particular grounds of that opinion we cannot look. If, however, there is any ambiguity, I think Sir *W. Follett* may put in the depositions. But at present the decree is *prima facie* evidence, and may be read accordingly.

PARKE, B.—A decree is evidence, in the same manner as a verdict in a Court of law is evidence; and, at all events, the objection to its admissibility comes too late, after it has been actually read. I am, moreover, of opinion, upon looking at the prayer in the bill, and also at the answer, that the custom is really in issue. The decree is, therefore, admissible, subject to such observations as Sir *W. Follett* may think proper to make upon its effect. The next question is, whether the depositions must be read; and I am of opinion that the plaintiffs are not compelled to read them. The only object of reading them would be to shew what matters were in issue; but that information may be obtained from the bill and answer. The case is different in the action of *indebitatus assumpsit*, where it often becomes necessary to produce the evidence given at the trial, for the purpose of explaining the nature of the verdict. Here the matter in issue appears from the bill and answer.

BOLLAND, B.—I think the decree may be admitted, without the production of the depositions. I am also of opinion that the objection to its admissibility comes too late.

ALDERSON, B.—I entirely concur with the rest of the Court. The objection to the admissibility of the decree is made too late. The time of the public would be strangely wasted, if, after a decree had been read by consent of both parties, it were open to one party to object to its being laid before the jury. The result of such a practice would be, that the same thing might be done at any period of the cause. If an objection is intended, it should be made at the time. It is sometimes necessary to look into a document, to ascertain whether it is admissible or not, but then the object of doing so is openly avowed; here the decree was read with a view to its effect upon the minds of the jury. I think the decree is receivable in evidence, on the

ground that all which proves the existence of the custom is strictly admissible. This decree proves the existence of an immemorial custom, and that is material, with a view to the present question of admeasurement. The other facts that it tends to establish may have more or less weight, according to circumstances. The next point is, whether the decree is admissible in evidence without the depositions. It is said that they ought to be produced, because they are referred to in the decree; but it should be recollected that it is by the bill and answer, with the admissions and affirmations contained in them, that a Court of equity determines the questions that are submitted to its consideration. The decisions of Courts of equity are subject to appeal, which may often turn on the facts of the case, and therefore it is necessary for the decree to refer to the evidence, to enable the Court of appeal to review the decision of the Court below. That is the reason of the depositions being placed upon the record. But if we were to insist upon the production of the depositions in this case, we should in fact be making ourselves a Court of appeal from the judgment of the *Exchequer* in 1783.

Objections overruled.

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END OF TRINITY TERM.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF EXCHEQUER,

IN

Michaelmas Term, 2 Victoria, 1838.

LEWIS v. FORD.

Exchequer.

IN this case the defendant had been arrested, and was out on bail, at the time the 1 & 2 *Vict.*, c. 110, came into operation. A rule having been obtained by *Archbold* to enter an *exoneretur* on the bail-piece,

Where the defendant was out on bail before the 1 & 2 *Vict.* c. 110, came into operation, and it appeared that he was residing abroad, the Court refused to relieve the bail.

Humfrey shewed cause, upon an affidavit, which stated, that since the defendant had given bail he had quitted *England* and was now in *France*; and that deponent was informed, and believed, that he intended to remain there. Under these circumstances the Court would not enter an *exoneretur* on the bail-piece, since if he had rendered in discharge of his bail, and it had appeared that he was about to leave the country, the plaintiff might have obtained an order for detaining him under the 3d section.

Archbold, in support of the rule, contended, that the defendant was in the custody of his bail on the 1st *October*, and therefore the Court would relieve the bail, under the equitable construction of the 7th section, *Bateman v. Dunn (a)*.

Per Curiam.—You must render the defendant, and then apply. The Court are not bound to relieve a prisoner, unless he was in actual custody on the 1st *October*.

Rule discharged.

(a) 1 *Arnold*; 5 *Bing.* N. C. 49. See *Ashley v. Hughes*, 1 *Will.*, *Woll.* & *Hodg.* 402, B. C.

Eschequer.

LARCHIN v. WILLAN.

The 1 & 2 Vict. c. 110, s. 3, (enabling a judge to make an order for arresting the defendant) applies to all cases in which the defendant is about to leave *England* for such a period that the plaintiff would be deprived of his execution in the ordinary course.

BUTT moved for a rule to shew cause why the order of *Gurney, B.*, for arresting the defendant under the third section of 1 & 2 *Vict.*, c. 110, should not be rescinded; and why the bail-bond should not be delivered up to be cancelled. It appeared from the affidavits, that the defendant was an officer in the 22d regiment, which had recently returned from foreign service, and was now in *Ireland*. That defendant had leave of absence, from ill health, which leave would not expire until the 30th of the month, when he was about to join his regiment, provided his health enabled him so to do. This is not a case within the 3d section of the 1 & 2 *Vict.*, c. 110 (a). It is clear, from the words "forthwith apprehended," that the legislature contemplated the case of a person leaving *England*, in order to avoid being sued. Here the defendant is obliged to leave, in performance of his duty as an officer. A similar case occurred before *Coltman, J.*, at Chambers: and that learned judge having consulted *Tindal, C. J.*, decided that the third section of the Statute did not apply to an officer about to leave *England*, in respect of his duty as such.—[*Alderson, B.*—The effect of his leaving is to avoid process. The inconvenience is the same, whether he go for a good or a bad purpose.—*Parke, B.*—It is clear, that every case of a person about to leave *England* is not within the meaning of the Statute; for instance, the case of the captain of a packet plying between *Dover* and *Calais*.]—Here it appears that it is only a temporary absence, whilst the regiment is in *Ireland*. The Statute would seem to apply only to cases of permanent absence in order to avoid the process.

PARKE, B.—I am of opinion that the defendant is not entitled to a rule. It appears, from his own affidavit, that he is about to proceed to *Ireland*, to join his regiment. I agree in the view taken by my brother *Alderson*, that a plaintiff has a right to arrest the defendant, unless it appears that he is about

(a) 1 & 2 *Vict.*, c. 110, sec. 3.—"And be it enacted, That if a plaintiff in any action, in any of her Majesty's superior Courts of law at *Westminster*, in which the defendant is now liable to arrest, whether upon the order of a judge or without such order, shall, by the affidavit of himself or of some other person, shew to the satisfaction of a judge of one of the said superior Courts, that such plaintiff has a cause of action against the defendant or defendants to the amount of twenty pounds or upwards, or has sustained damage to that amount, and that there is probable cause for believing that the defendant, or any one or more of the defendants, is or are about to quit *England*, unless he or they be forthwith apprehended, it shall

be lawful for such judge, by a special order, to direct that such defendant or defendants, so about to quit *England*, shall be held to bail for such sum as such judge shall think fit, not exceeding the amount of the debt or damages; and thereupon it shall be lawful for such plaintiff, within the time which shall be expressed in such order, but not afterwards, to sue out one or more writ or writs of *capias*, into one or more different counties, as the case may require, against any such defendant so directed to be held to bail; which writ of *capias* shall be in the form contained in the schedule to this Act annexed, and shall bear date on the day on which the same shall be issued."

to leave *England* for a mere temporary purpose, and will return in sufficient time to enable the plaintiff to proceed to judgment and execution. I should have been disposed to grant this rule, out of respect to my brother *Coltman*; but I have communicated with him, and though he did decide as stated, after consulting with the Chief Justice, yet he now thinks that in that case there was sufficient ground for arresting the defendant, and has changed the opinion upon which he then acted.

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ALDERSON, B.—I have corresponded with my brother *Littledale* in vacation, and we have come to the conclusion, that, inasmuch as the party is deprived of his remedy in the first instance, if the judge has reason to believe that the defendant's absence from *England* would prevent the plaintiff from having execution of the body at the proper time, that is a ground for ordering his arrest. But let us look at the practice which existed before the recent Statute. In cases in which a party could not be held to bail by a mere affidavit, it was usual to subject him to arrest, at the discretion of a judge, in order that he might be forthcoming, to be taken in execution. That is the meaning of the present enactment. If it meant more, the Statute would have taken away arrest altogether, and have left only *mesne process*. The third section clearly intends to give the plaintiff, in the first instance, that which he would be ultimately entitled to.

GURNEY, B.—I am of the same opinion.

Rule refused

ISAACS v. RICHARDS.

JERVIS shewed cause against a rule obtained by *Archbold*, for staying proceedings upon the bail-bond upon payment of costs. A writ of *capias* issued on the 30th *June*, under which the defendant was arrested on the 6th *July*. On the 14th *July* the defendant's attorney took out a summons (returnable the following day) to stay proceedings, upon payment of debt and costs. An order was made accordingly; and it provided, "that in default of payment of the debt and costs forthwith, the plaintiff should be at liberty to sign final judgment." The costs were taxed, but nothing further was done in pursuance of the order. Upon the 14th *August* the plaintiff took an assignment of the bail-bond, and on the 15th the defendant's attorney undertook to appear to the original action. The defendant died on the 9th *September*. *Jervis* contended that as nothing had been done under the order, it was not competent to apply for a stay of proceedings on the bail-bond, and to compel the plaintiff to sign final judgment against the defendant.

On the 6th *July* the defendant was arrested, and on the 14th a summons was taken out to stay proceedings, upon payment of debt and costs. An order was accordingly made, which provided, that "in default of payment, the plaintiff should be at liberty to sign final judgment." The costs were taxed, but nothing further was done under the order. On the 14th *August* the plaintiff took an assignment of the

Archbold, in support of the rule.—By the terms of the order, the plaintiff was in a situation to sign final judgment, upon entering an appearance. The defendant having applied to stay proceedings upon payment of the debt and

bail-bond, and on the 9th *September* the defendant died :—*Held*, that the bail were entitled to relief, upon payment of the costs of the bail-bond.

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RICHARDS.

costs, it was a condition precedent that he should consent to judgment, in case the debt and costs were not forthwith paid. This, then, amounts to an implied authority to the plaintiff to enter an appearance.

PARKE, B.—The question turns upon the meaning of the undertaking in the order for staying proceedings. If the meaning be that which Mr. *Archbold* contends for, namely, that the plaintiff should have the power of signing judgment, upon entering a common appearance, then he is right; because the defendant having died, the bail would be entitled to be relieved upon payment of the costs of the bail-bond. If the defendant had appeared, it is clear that the plaintiff would have lost a trial; and in that case the bail would not be entitled to relief, except upon the terms of the bail-bond standing as a security. It is true that the defendant has admitted the debt, by making the application to stay proceedings; but unless the order means something more than it imports, the defendant is entitled to relief. I am of opinion that the order only means, that the plaintiff is to be at liberty to sign final judgment upon a common appearance. If it meant that he was to have the benefit of special bail, the plaintiff should have drawn up the order in those terms.

ALDERSON, B.—I am of the same opinion. The order only gave power to the plaintiff to sign judgment upon a common appearance.

Rule absolute.

Pocock and another v. CAPPERTON.

Pocock v. PERCY.

Where proceedings have been taken against the bail, affidavits in support of an application to set aside the *ca. sa.* are properly entitled, both in the original action, and in that against the bail.

A writ of *ca. sa.* was lodged at the sheriff's office on the 24th October, and on the 3d November proceedings were commenced against the bail: *Held*, too late to apply on the 13th November to set aside the *ca. sa.*

HOGGINS had obtained a rule *nisi* to set aside the writ of *ca. sa.* issued in the first-mentioned action. The principal objection was, that the writ was in the name of the late king. The *ca. sa.* was lodged at the sheriff's office on the 24th October. On the 3d November proceedings were commenced against the bail; and on the 13th November the present motion was made.

Dowling shewed cause; and objected, in the first instance, that the affidavit on which the rule was obtained was improperly intituled. It might be intituled either in the original action, or in that against the bail, but not as here in both actions.

The COURT decided that the affidavit was properly entitled.

Dowling then contended, that an irregular *ca. sa.* was no ground for setting aside the proceedings. Even if there be no *ca. sa.* sued out, the Court will not interfere on motion to stay the proceedings, but will leave the bail to plead that matter, *Philpot v. Manuel* (a). At all events, the application is too late.

Hoggins, in support of the rule, referred to the affidavits, in which it was stated, that notice of the objections had been given to the plaintiff on the 4th *October*. Besides, an application had been made to a judge at Chambers to enter an *exoneretur* on the bail-piece.

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v.
CAPPERTON.

LORD ABINGER, C. B.—This motion comes too late. If the application at Chambers had been of the same nature, it might perhaps have altered the case; but it appears to have been of a different kind.

PARKE, B.—If the application at Chambers had been of the same nature, I should still have thought this motion too late, as there was the whole of the Term before the 13th to apply in.

Rule discharged.

The QUEEN v. The Sheriff of MIDDLESEX, in the case of HORNE v. JONES.

PETERSDORFF had obtained a rule to shew cause why the writ of attachment, issued in this case, should not be set aside for irregularity. On the 15th *July* the defendant was arrested, and gave a bail-bond to the sheriff. On the 24th *July* the plaintiff obtained a judge's order to bring in the body; that order did not expire until the 28th. On the 25th, special bail was put in by affidavit, and notice thereof served upon the plaintiff's attorney the same day. It was a case of town bail, and the plaintiff's attorney made no exception to them. On the 2d *November* an attachment was obtained for not bringing in the body.

The 1, 2, 3, & 4 rules of T. T., 1 Will. 4, apply only to cases of bail put in in the ordinary course; therefore, where the sheriff puts in bail under a body rule, he must justify without notice of exception.

Erle shewed cause.—The question is, whether putting in bail by affidavit is a putting in and perfecting bail, so as to render this attachment irregular. The terms of the order are, that the sheriff shall bring in the body, by putting in and perfecting special bail. As he has allowed eight days to elapse, he must put in bail, and justify without any exception. The fourth rule of *Trinity Term*, 1 Will. 4, which directs, that if a plaintiff does not give one day's notice of exception, where the bail justify by affidavit under the new rules, the recognizance may be taken out of Court, does not apply where the bail are put in in that made after the regular time for putting in bail has expired, *Rex v. Wilson (a)*. The circumstance of the sheriff being out of time, of itself amounts to an exception.

Petersdorff, in support of the rule.—This rule was obtained on the ground that the sheriff was not in contempt at the time the bail was put in. *Rex v. Wilson* cannot be considered as any authority; as it does not appear in that case when the sheriff was ruled to bring in the body, or whether or not the bail was put in within the four days. The sheriff is only bound to justify without

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exception, when it appears that he is in default.—[*Parke, B.*—The rule only applies to putting in bail in the ordinary course. But supposing the sheriff is after the time, he must put in and perfect bail without exception.]—It is assumed on the other side that the sheriff is in default, which is not the case.—[*Lord Abinger, C. B.*—My difficulty is to see how the sheriff can be said to be in default, when he has four days to bring in the body. The question is, whether the sheriff is bound to bring the defendant in without a body rule.]—The sheriff has clearly four days to obey the judge's order. All that is stated upon the affidavits is, that bail was put in; and the Court will not assume that any essential preliminary has been neglected.

LORD ABINGER, C. B.—I am inclined to think that the construction put upon the rule by my brother *Parke* is the true one; and I am more disposed to yield to that view of the case, as the Master reports that it is the constant practice, where the sheriff justifies under the rule to bring in the body, to put in and perfect bail at the same time. It is right, however, to say that I do not see how the sheriff could have been said to have made default at the time the bail was put in. He had four days to return the writ, and after that he had four days to bring in the body. The question, however, turns upon the application of the rule of *T. T., 1 Will. 4.*, to this particular case; and I am of opinion that the rule must be discharged.

PARKE, B.—The rule of *T. T., 1 W. 4.*, does not apply to a case like the present. That rule is, that “a defendant may justify bail at the same time at which they are put in, upon giving four days' notice for that purpose.” How is a sheriff to do that, when he has only four days to put in and perfect bail. It seems to me that the 1, 2, 3, & 4 rules of *Trinity Term, 1 Will. 4.*, apply only to cases in which bail is put in in the ordinary course, and not to cases of this kind, in which the sheriff is obliged not only to put in, but also to justify bail.

Rule discharged.

BUZZARD v. BANSFIELD.

The rule of *T. T., 3 Will. 4.* (which requires a plaintiff to declare against a prisoner before the end of the Term next after arrest or detainer) does not apply to the case of a detainer lodged under the *7 Geo. 4, c. 57, s. 55.*

ON the 5th *February* the defendant was arrested at the suit of another creditor, and on the 7th petitioned for his discharge under the *Insolvent Debtor's Act*. On the 12th *May* the petition was heard, and the Court then made an order that he should be discharged forthwith, as to all debts stated in his schedule, with the exception of two, one of which was due to the present plaintiff; and for these he was ordered to be detained in prison sixteen months. On the same day that the adjudication took place, the plaintiff lodged a detainer against the defendant, under the 55th section of the *7 Geo. 4, c. 57*, which enacts, “that in all cases where it shall have been adjudged that any such prisoner shall be so discharged, and so entitled as aforesaid at some future period, such prisoner shall be subject and liable to be detained in prison, and to be arrested and charged in custody, at the suit of any one or more

of his creditors, with respect to whom it shall have been so adjudged at any time before such period shall have arrived, in the same manner as he or she would have been liable to if this Act had not passed." The plaintiff had taken no further step in the action.

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Kelly moved to discharge the defendant out of custody as to this action, on the ground that he was supersedeable. The detainer was lodged on the 12th *May*, and the plaintiff not having yet declared, the defendant is entitled to his discharge under the rule of *T., 3 W. 4*; unless the *supersedeas* is taken away by the 15th section of 7 *Geo. 4, c. 57*. That section enacts, "That no prisoner, who shall have so petitioned the said Court for relief under this Act, shall, after the filing of his or her petition, be discharged out of custody as to any action, suit, or process, for or concerning any debt, sum of money, damages, or claim, with respect to which an adjudication in the matter of such petition can, under the provisions of this Act be made, by or by virtue of any supersedeas, judgment of *non pros*, or judgment as in case of a non-suit for want of the plaintiff or plaintiffs in such action, suit or process proceeding therein." This section only contemplates the case of an action brought before the time of the adjudication. The words "with respect to which an adjudication in the matter of such petition *can be made*," have evidently a prospective effect. In construing this Statute, all its provisions must be read together. The 50th section enacts, that every discharge so adjudicated as aforesaid as to any debt or damages of any creditor of such prisoner, shall be deemed to extend also to all costs incurred by such creditor *before the filing of such prisoner's schedule*, in any action or suit brought by such creditor against such prisoner for the recovery of the same; and that all persons, as to whose demands for any such costs, money, or expences as aforesaid, any such person shall be so adjudged to be discharged, shall be deemed and be taken to be creditors of such prisoner in respect thereof, and entitled to the benefit of all the provisions made for creditors by this Act." If an action be brought after a prisoner has filed his petition, and the plaintiff proceeds to judgment and execution before the time of adjudication, there is no provision in the Statute to exonerate the prisoner from the costs of that action.—[*Parke, B.*—The Statute affords a good plea in bar to any action for their recovery.]—The discharge can only be pleaded in cases where the action is brought after the adjudication has taken place.—[*Parke, B.*—The prisoner is discharged as to the debt, and therefore incidentally as to the costs; he may relieve himself by an *audita querelā*.]—The 15th section cannot apply to a case like the present, which is a debt in respect of which an adjudication *has been made*.

PARKE, B.—The case does not appear to admit of the least doubt. The Statute enables the Court to discharge a prisoner as to all debts mentioned in his schedule; the discharge, therefore, would be a good bar to any action brought for such debts; and it follows, as a consequence, that the defendant would have a verdict, and that the plaintiff would be obliged to pay the defendant's costs. The 50th section expressly discharges the prisoner from the costs incurred before the filing of his petition, and gives a corresponding remedy to the plaintiff, by enabling him to be a creditor in respect of them. I am of opinion that the 15th section applies to all actions brought within such time

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as to enable the party to come in for a rateable proportion with the other creditors. When a person has taken the benefit of the Act, it would be a great hardship to compel the creditor to incur further expence in proceeding against him. If the plaintiff do not declare within a year, he will perhaps be out of Court; but it is sufficient in this case to say, that the defendant is not supersedeable.

ALDERSON, B.—Where there is an order by the Insolvent Court that a prisoner shall be discharged at the end of sixteen months, I doubt whether the plaintiff is compelled to declare within the year. He is obliged to sue out process, in order to prevent the prisoner from being discharged, and then he must be considered as having made his election to come in with the other creditors. I am clearly of opinion that the defendant in this case is not supersedeable.

Rule refused.

**Wood and another, Assignees of W. & G. HOWARD v.
 DUNCAN,**

In an action by the assignees of a bankrupt, the first four counts were for money paid, &c., laying the promises to the bankrupt. There were similar counts, laying the promises to the assignees. The defendant pleaded, as to the first four counts, except as to 239*l.* 13*s.* 4*d.* *non assumpsit*; *secondly*, to the whole declaration, denial of the bankruptcy; *thirdly*, to the first four counts, a set-off; *fourthly*, to the same counts, payment; *fifthly*, to the same counts, release; *sixthly*, as to 80*l.* 12*s.* parcel of the first four counts, payment by two promissory notes; *lastly*, to the last set of counts, a similar plea of payment. The cause was referred to an arbitrator, who was to be at liberty to vacate the verdict, and enter a verdict for defendant; the costs of the award and reference to abide the event. The arbitrator ordered, that the verdict entered for the plaintiff be vacated; and that a verdict be entered for the plaintiff on the first, second, fourth, fifth and sixth issues; and for the defendant on the third and last.—*Held*, that the award was bad, inasmuch as the arbitrator had not found for the defendant on any plea which covered the whole cause of action; and that although he had found for the plaintiff, he had awarded no damages.

ASSUMPSIT. The first four counts were for money paid, money had and received, interest, and money due on an account stated, alleging the promise to have been made to the bankrupts. There was another set of counts, laying the promises to the plaintiffs as assignees. The defendant pleaded *first*, as to the first four counts, except as to the sum of 239*l.* 13*s.* 4*d.* parcel, &c., *non-assumpsit*; *secondly*, to the whole declaration, that *W. & G. Howard*, were not bankrupts; *thirdly*, to the first four counts, a set-off for money due from *W. & G. Howard* before their bankruptcy; *fourthly*, to the same counts, payments; *fifthly* to the same counts, release; *sixthly*, as to 80*l.* 12*s.*, parcel of the monies in the first four counts mentioned, payment by two promissory notes; *lastly*, to the last set of counts, a similar plea of payment.

The cause having been called on for trial, a verdict was taken by consent for the plaintiffs, damages 1,000*l.*, subject to a reference to a barrister, who was to be at liberty to vacate the verdict, and enter a verdict for the defendant, if he should think fit. The costs of the award and reference were to abide the event. The arbitrator awarded, that the verdict found for the plaintiffs be vacated, and that a verdict be entered for the plaintiffs on the first, second, fourth, fifth, and sixth issues; and for the defendant on the third and last.

Cowling moved to set aside the award, as insufficient.—The arbitrator has

not stated whether the verdict should be entered for the plaintiffs or defendant, and if for the plaintiffs, to what damages they are entitled. It was impossible to say on this award, for which party judgment ought to be entered.

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W. H. Watson shewed cause in the first instance.—The award is no doubt ambiguous, but if the Court can see the arbitrator's intention, they will not set it aside. It appears on the face of the award, that he did not intend to find for the plaintiffs, for if he had meant the plaintiffs to have the costs, he would have gone on to find damages. The objection has arisen from a mere error in copying the draft. If a verdict at *nisi prius* be entered erroneously the Court will amend it, and this is an analogous case.—[*Alderson, B.*—Here there is nothing to amend by.]

PARKE, B.—It is clear that some mistake has been made. In the case of an erroneous entry of a verdict at *nisi prius*, the court corrects it by virtue of the 8th *Hen. 6*, c. 12, on the presumption that it is a misprision of the clerk. But here, whichever way the verdict was entered there would be error, for the arbitrator has not found for the defendant on any plea which covers the whole cause of action, and although he has found for the plaintiffs, he awards no damages. This may be a case of great hardship, but as it is impossible for the Court to ascertain which way the arbitrator meant to find, we cannot interfere.

Rule absolute.

DAVIES v. GRIFFITHS.

BUSBY moved for a rule, calling upon the under-sheriff of *Merionethshire* to shew cause why he should not answer for a contempt of Court, in taking more fees than were allowed by the judges, under the authority of 1 *Vict. c. 55*, ss. 2 & 3 (a). The under-sheriff having levied, sold the goods by auction, and has charged for poundage, as well as the per centage allowed by the new table of fees. The question is, whether the 29 *Eliz. c. 4*, has been virtually repealed by 1 *Vict. c. 55*. The latter Act repeals other Statutes, but makes no express mention of 29 *Eliz. c. 4*. The table of fees allowed by the officers of the Courts, and sanctioned by the judges, relates

The Statute 1 *Vict. c. 55*, relates to those sheriff's fees only which are payable on sales by auction; and has not repealed 29 *Eliz. c. 4*. Consequently sheriff's fees under the latter Statute remain the same as before the passing of 1 *Vict. c. 55*.

(a) The second section of 1 *Vict. c. 55*, is to this effect: "And be it enacted, That from and after the passing of this Act, it shall be lawful for sheriffs, or their officers concerned in the execution of process directed to sheriffs, to take, demand and receive such fees, and no more, as shall from time to time be allowed by any officer of the several courts of law at *Westminster*, charged with the duty of taxing costs in such Courts, under the sanction and authority of the judges of the said Courts respectively."

Section 3. "And be it enacted, That any sheriff, officer, or minister, acting in the execution of process directed to any sheriff or sheriffs, or engaged or concerned therein, who shall extort, demand, take or receive from any person or persons, any fee or fees, gratuity or reward, not allowed as aforesaid, or greater in amount than as allowed as aforesaid, such sheriff," &c. then follows the penalty.

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to sales by auctions only (b). But the remuneration allowed under it is greater than that which is given by 29 *Eliz.* c. 4; and hence it may be presumed that the intention of the late Act was, that sheriffs should have no greater remuneration than is there mentioned.

Per Curiam (c).—According to that argument, the sheriff would not be entitled to any thing for taking the body of a debtor in execution. The Act of 1 *Vict.* c. 55, has nothing to do with poundage; it relates to sales by auction only, and does not affect the rights of the sheriff in other respects. If no sale by auction takes place, the sheriff must sell the goods in some other manner, and then he will be entitled to his fees. There is no ground for a rule.

Rule refused.

(b) In the table of fees sanctioned by the judges, under the authority of 1 *Vict.* c. 55, s. 2, the only fees allowed to sheriffs under the head "Executions" are as follows:—"For each man left in possession, when absolutely necessary, if boarded, *per diem*, 3s. 6d., if not boarded, 5s. For every sale by auction, when the property sold does not pro-

duce more than 300*l.*, 5 *per cent.*; 400*l.*, 4 *per cent.*; 500*l.*, 3 *per cent.*; exceeding 500*l.*, 2½ *per cent.* For certificate of sale, to save auction duty, 2s. 6d. Bond of indemnity, besides stamp, 1*l.* 10s. 6d. Certificate of execution having issued, for second, 5s."

(c) Lord Abinger, C. B., Parke, B., and Gurney, B.

COPPOCK v. BOWER.

An agreement to withdraw, in consideration of money, an election petition, presented against the return of a member of the House of Commons on the ground of bribery, is illegal. And such an agreement is admissible in evidence to prove the illegality of the transaction without being stamped.

DEBT on an account stated. *Second plea*, as to 500*l.*, parcel of the sum demanded, *actio non*, because, before the making of the agreement hereinafter mentioned, at a certain election, holden at *Maidstone*, of a burgess to serve in Parliament for that borough, one *J. M. F.* had been, by the returning officer, declared duly elected, and returned as such burgess; and against such election and return a certain petition had been thereupon presented by certain electors of the said borough to the Commons' House of Parliament, alleging that the said *J. M. F.* had been guilty of bribery and corruption, and other illegal practices in the said election; and that the return of *J. M. F.* had been obtained by bribery, treating and other illegal practices; and praying that the said election and return might be declared null and void; which said petition, at the time of the making of the said agreement hereinafter mentioned, was pending, the prosecution thereof being confided by the said petitioners to the care and management of the plaintiff as their agent; and thereupon and before the stating of the account in the declaration mentioned, it was corruptly and unlawfully agreed, by and between the plaintiff, as such agent, and the said defendant, that the defendant should pay to the plaintiff, within a certain time, the sum of 500*l.*; and procure *J. M. F.* as well to consent that his election and return should be declared null and void, as to promise that, in the event of any general election of members to serve in Parliament, or of any second vacancy occurring in the representation of the said borough, he, the said *J. M. F.*, should not, either by himself or

through any of his friends, by means of any coalition with any other candidate, oppose the election and return of one *A. W. R.* as one of the burgesses of the said borough; and that, in consideration of the premises, the said charges of bribery and corruption, and other illegal practices in the said petition contained, should be no further prosecuted against *J. M. F.*, and upon his election and return being declared null and void, and the said *J. M. F.* being again proposed as a candidate for the said borough, no other candidate should be procured or assisted, or authorized by the plaintiff to oppose the return of *J. M. F.*, at such new election; and in the event of his return, no petition should be presented against such return; the plaintiff also using his best endeavours to procure such new election to be holden within four days after the precept in that behalf should be received by the returning officer of the said borough. And the defendant further says, that the said account so stated between the plaintiff, and him, the defendant, as to the sum of 500*l.*, parcel, &c., was stated of and concerning the sum of 500*l.* so corruptly and unlawfully agreed to be paid as aforesaid, and of and concerning no other sum; and the same by reason of the premises, was a corrupt and unlawful account, and was and is wholly void.

Replication to the second plea, that it was not corruptly and unlawfully agreed between the plaintiff, as such agent, as in that plea mentioned, and the defendant, in manner and form, &c., nor was the said account stated between the plaintiff and defendant as to the said sum of 500*l.*, parcel, &c., stated of and concerning the said supposed sum of 500*l.* alleged to have been so corruptly and unlawfully agreed to be paid as in the plea mentioned.

Issue thereon.

At the trial before *Patteson, J.*, at the *Maidstone* Summer Assizes, 1838, the defendant offered in evidence three unstamped papers, containing the agreement stated in the plea. *Law*, for the plaintiff, objected to the reception of them, on the ground of their not being stamped. The learned judge received the evidence, and the defendant had a verdict on the plea above stated.

Law now moved for a rule to shew cause why judgment should not be entered for the plaintiff on this plea, *non obstante veredicto*; or why there should not be a new trial. There are two questions for the consideration of the Court; first, whether this agreement is illegal; secondly, whether, being unstamped, it was admissible in evidence. This is not an illegal contract. The plaintiff, as agent of the petitioners, had a right to put an end to the petition, and if so, he was entitled to put an end to it on certain terms. Those terms in substance were, that part of his costs should be paid by the defendant. If he had proceeded, and had proved bribery and agency, the defence against the petition would have been declared frivolous and vexatious, and he would have been entitled to his costs. This is not to be considered an agreement to forbear to press a charge, but an agreement not to urge a petition which might always have been abandoned.

Secondly, this agreement, being unstamped, was not admissible. The rule with regard to stamps seems to be this; that where an instrument is used for a collateral purpose, it is admissible without a stamp; but where it is offered as direct and affirmative evidence, there a stamp is necessary. In

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cases of forgery, the absence of a stamp does not prevent the jury from looking at the forged instrument, *Rex v. Hawkewood (a)*. An unstamped agreement is admissible to prove usury, *Nash v. Duncombe (b)*; but that case is distinguishable, as the purpose was collateral, and the rule depends upon the words of the Statute, 12 Ann, st. 2, c. 16, s. 1, which forbids the taking of usurious interest "by any deceitful way or means, or by any covin, engine, or deceitful conveyance." So an unstamped policy may be read in evidence to prove the effecting of a lottery insurance; and an unstamped promissory note, given by a voter as a cloak for a bribe, has been held admissible evidence against the candidate in an action for bribery. But in those cases the documents were tendered in evidence for a collateral purpose. The cases on this subject are collected in 2 *Starkie on Evidence*, 2d edit., p. 772. On an indictment for setting fire to a house, with intent to defraud an insurer, an unstamped policy is not admissible in evidence to prove the contract of insurance, *Rex v. Gilson (c)*. In a late case at the *Old Bailey*, on an indictment for stealing fixtures, an agreement, containing the terms of the holding, was refused, because it was not stamped. *Whitwell v. Dimsdale (d)*, shews that an agreement which is not stamped, cannot be admitted as evidence for any purpose whatever; not even to shew that the party intended to commit a fraud by that agreement. [He also cited *Vincent v. Cole (e)*, and *Rex v. Fowle (f)*. In the present case the instrument was used as affirmative evidence of a valid agreement.—[*Parke, B.*—It was received on the ground of its being an invalid agreement in one respect.]—A party ought not to claim an exemption from the consequences of his signature, by virtue of an agreement which is not stamped.

' Lord ABINGER, C. B.—If there had been any doubt on this question, it would be proper to put it in a train of enquiry; but the principle is clear, and the only question is, whether it governs this case. The authorities shew that the Stamp Act does not apply to the case of an agreement which, being void in its commencement, is afterwards set up as obligatory. It is conceded by the learned Recorder, that, in the case of usury, an agreement may be admitted in evidence without being stamped. In this case the contract is *primâ facie* void, and if stamped would not be valid; and it would defeat the very object of the statute and common law, to hold that a party should not be allowed to prove an illegal agreement unless it were stamped. Such a decision would furnish a party with the means of accomplishing an illegal object. It is clear that, on the question whether an agreement is void or not, a document which is not introduced with a view to enforce the agreement, does not require a stamp. Suppose two parties make a contract to commit a robbery, and divide the spoil, could it be said that that contract was inadmissible in evidence because it was not stamped? Or suppose an indictment for a conspiracy, could not that offence be proved by means of documents that were not stamped? The object of the Stamp Act was to prevent parties from availing themselves of an unstamped agreement. The question then,

(a) Leach, 295.
 (b) 1 Mo. & Rob. 104.
 (c) 1 Taunt. 95.

(d) Peake's N. P. C. 224.
 (e) 3 Car. & P. 481.
 (f) 4 Car. & P. 492.

is, whether this agreement is unlawful ; and I think it is so at common law. Here is a petition charging the candidate with bribery, and the enquiry that takes place upon it is instituted, not for the benefit of individuals, but of the public. As soon as the petition is presented, the public alone are regarded. Where a petition cannot be supported, it may be abandoned, but not abandoned for money. The case is the same with a prosecution for any other crime ; a party must not take money as a motive for forbearing to prosecute. This agreement is illegal in another respect, as the party agrees in consideration of a sum of money to use his influence at another election. But it is sufficient to say that the contract is illegal, because money is agreed to be given as an inducement to stop a prosecution. There is no ground, therefore, for disturbing this verdict.

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PARKE, B.—I am of the same opinion. The first question is, if this instrument is admissible without a stamp. I think it is, and that the Stamp Acts apply to those cases only where the instrument is set up as a valid agreement, and not where it is used for a collateral purpose. Here the document was offered in evidence, not as a valid instrument, but for the purpose of cutting down another agreement. The question was, whether the object of part of the agreement was to cause the petition for bribery to be withdrawn ; the jury have found that it was ; that part, therefore, of the agreement was illegal. The penalties for bribery have been imposed for public purposes, and to stifle a petition for bribery is the same as to stifle a prosecution for the same offence. The jury, therefore, were right in saying that the agreement was proved, and the plaintiff cannot recover.

ALDERSON, B.—By the schedule of 55 *Geo. 3*, c. 184, an agreement is to be stamped, whether “ the same shall be only evidence of a contract, or obligatory upon the parties from its being a written instrument.” The meaning of those words is, that the instrument shall have a binding effect. But here the agreement is not obligatory upon the parties, and therefore does not require a stamp. It is an illegal agreement, and therefore void.

GURNEY, B., concurred.

Rule refused.

CLARKSON v. PARKER.

BY an order of *Alderson*, B., the attorney for the defendant, who had become bankrupt, was required to deliver to the assignees of the bankrupt his bill of costs, to be taxed, and all accounts of money secured by him on behalf of the bankrupt ; the assignees undertaking to pay him a rateable dividend on what might be found due to him. The attorney admitted the receipt of money on account of the bankrupt. His charges did not relate to business done in Court. *Humfrey*, having obtained a rule, calling upon the

The Court will compel a bankrupt's attorney, who has admitted the receipt of money on account of the bankrupt, to deliver his bill to the assignees.

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assignees to shew cause why the order of *Alderson*, B. should not be rescinded,

R. Gurney now shewed cause.—The assignees are willing to abandon that part of the order that relates to the taxation of the bills, but they contend that they are entitled to know the state of accounts between the bankrupt and his attorney. This motion places the attorney in a more favourable situation than if he were to prove under the fiat; since, in that case, he would have to surrender all papers of the bankrupt that he might be holding as securities. The judge's order imposes no such terms upon him.

Humfrey, contrd.—The attorney's motive for refusing to deliver his bill is, that the expence of preparing it would amount to a large sum, of which he would recover nothing under the commission, the estate of the bankrupt being insolvent.—[*Parke*, B.—There is no doubt that we might order this bill to be delivered, if we possessed a general power of referring attorney's bills to taxation. Mr. *Tidd* says (a), that the Courts possess this power, but considerable doubts were entertained on that point when the question was discussed (b). An attorney will be ordered to deliver papers, for the recovery of which a *mandamus* will lie. *In the matter of Aitkin* (c) is in point, and has not been overruled.]—The Courts have the power of ordering attorneys to deliver their bills in those cases only where there is a jurisdiction to order those bills to be taxed. It is now settled, by the cases of *Dagley v. Kentish*, and *Clutterbuck v. Coombes* (d), that the Courts do not possess a general power of referring an attorney's bill for taxation, independently of the Statute (e). The case *In the matter of Aitkin*, where the Court compelled an attorney to account for moneys received by him, was decided at a time when, as appears from *Wilson v. Gutteridge* (f), the Courts thought they had a general jurisdiction to order taxation of an attorney's bill. But this latter case has been overruled in *Dagley v. Kentish*, and *Clutterbuck v. Coombes*, and therefore the decision of the Court will not be governed by the decision *In the matter of Aitkin*.—[*Alderson*, B.—It is the universal practice to compel attorneys to account for moneys received by them in their professional character. The Courts have exercised this power with the consent of the attorneys themselves; and I am sure it is the interest of the best part of the profession that the practice should continue.]—The Stat. 2 Geo. 2, c. 23, does not apply to bankrupts. Again, it is incidental to taxation, that the party succeeding shall be paid the costs of taxing. But in this case it is proposed that if the attorney succeeds in establishing his entire bill, he shall only be paid rateably with the other creditors of the bankrupt. If the assignees were to bring an action against him for money received by him for the bankrupt, he would be entitled to full costs if he succeeded in proving that the bankrupt owed him more than he had received.

(a) P. 327, 9th edit.

(b) See *Dagley v. Kentish*, 2 B. & Adol. 413.

(c) 4 B. & Alder. 47.

(d) 5 B. & Adol. 400.

(e) See also *Ex parte Bowles*, 1 Hodges, 143; *Doc. d. Palmer v. Roe*, 1 Har. & Wol. 339; 4 Dowl. 95.

(f) 3 B. & Cr. 157.

PARKE, B.—It is the common practice to take out a summons, calling upon attornies to shew cause why they should not deliver a signed bill of costs, and no mention of taxation is made in the summons; and surely it is reasonable that a party should have power to ascertain the amount of his debt. There is no doubt that the bankrupt could have compelled the attorney to deliver his bill, and the question is, whether the assignees stand in the same situation. I think, on the whole, that the attorney must deliver his bill, but we make no order with regard to taxation. The rule, therefore, will be absolute for striking out of my brother *Alderson's* order so much as relates to taxation, and discharged as to rescinding what relates to the delivery of the bill, and the undertaking of the assignees to pay the attorney a dividend.

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ALDERSON, B.—The Statute which directs an attorney's bill to be taxed, modifies his right to have that bill settled by a jury; but it does not affect the right of the Court to order him to deliver that bill.

GURNEY, B.—It is certainly common to incorporate in one instrument an order for the delivery of a signed bill, and an order for its taxation; but there is no reason why each order may not be made separately.

Rule absolute for rescinding so much of the judge's order as related to the taxation of the bill; discharged, as to rescinding what related to the delivery of the bill, and the undertaking of the assignees (g).

(g) In *Ex parte Hicks*, 2 Deac. & Chit. 573, a summary application was made against three attornies, jointly, to pay over to the assignees a sum of money which they had received as the bankrupt's solicitors, under an order of the Court of Chancery, and it was held, that the application was not sustainable, as they were not all collectively attornies of the Court of Review. The reporters add a *quære*, whether such an order would have been made if the parties had been all attornies of that Court.

As to cases where the Court will order an attorney to pay over or to account for money received by him on account of his client, see *In re Bonner*, 4 B. & Adol. 811; 1 Nev. & Man. 555; *Hodson v. Ferrall*, 2 Dowl. 264; *Ex parte Deane*, 2 Dowl. 533; *In re Fenton*, 3 Ad. & Ell. 404; 1 Har. & Woll. 310; *Ex parte Cripwell*, 1 Will. Woll. & Dav. 356.

DOWLER v. COLLES.

ASSUMPSIT for goods sold and delivered. *Pleas, non assumpsit*, and payment. *Archbold* having, before the delivery of the replication, obtained a rule to shew cause why the *venue* should not be changed, under special circumstances,

An application to change the *venue* under special circumstances, may be made before issue joined, if the Court can see what the issue will be.

Hayes shewed cause, and contended, that the application was premature, having been made before issue was joined. He cited *Archbold*, vol. 2, p. 728, edit. 1834.

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Archbold, contra.—It is sufficient if the Court are able to see what the issue will be. Here the nature of the defence is evident.

Per Curiam.—It is taking the rule without the reason to say that the *venue* cannot be changed until the issue has been actually joined. It is sufficient if the Court can see, as in the present case, what the issue will be. The rule must be made absolute.

Rule absolute (a).

(a) *Weatherby v. Goring*, 3 B. & Cr. 552; *Maude v. Sessions*, 1 C. M. & Ros. 86; 4 Tyrw. 275; 2 Dowl. 699; *Parmeter v. Otway*, 3 Dowl. 66; *Youde v. Youde*, 4 Dowl. 32; 1 Har. & Wol.

338; *Bell v. Harrison*, 2 Cr. M. & R. 733; 1 Gale, 269; 1 Tyrw. & Gr. 193; 4 Dowl. 181. See also *Tidd's New Practice*, 308.

ROCK v. SLADE.

Where the wife of a lunatic, against whom no commission of lunacy had issued, had instructed an attorney to bring an action in her husband's name, and the defendant had paid money into Court:—*Held*, that she was entitled to have the money paid out to her.

AN action having been brought to recover the sum of 800*l.*, the defendant's attorney obtained a summons, calling upon the plaintiff's attorney to shew upon whose authority the action had been commenced. At the hearing, the plaintiff's wife stated that her husband had lost his reason, but that no commission of lunacy had issued against him, and that the action was commenced by her directions for the benefit of his family. Under these circumstances, *Coleridge, J.*, ordered the sum claimed to be paid into Court to abide the determination of the full Court.

Kelly having obtained a rule to shew cause why the sum in question should not be paid out of Court to the wife of the plaintiff or her attorney,

Petersdorff shewed cause.—The plaintiff, being a lunatic, was incapable of appointing an attorney, as that act presupposes sense and judgment. Hence it follows that, if this Court allows the defendant's money to be taken out of Court by the lunatic's wife, and the lunatic recovers his senses, and sues the defendant for the money, it will be no defence for the latter to plead that the money paid in by him was taken out in consequence of an order of this Court.

LORD ABINGER, C. B.—If no money had been paid into Court, and judgment had passed against the defendant, he would have been protected against any future action at the suit of the lunatic. But he thinks proper to interrupt the course of the suit by paying money into Court, and therefore, cannot complain if his defence is rendered somewhat weaker than it would otherwise have been. I am inclined to think, however, that a rule of this Court would be a sufficient protection to him. But my judgment does not proceed on that ground. It is impossible for this Court to enquire into the state of mind of this plaintiff, and to pronounce whether he is a lunatic or not. The rule must be made absolute.

PARKE, ALDERSON, and GURNEY, Barons, concurred.

Rule absolute.

HUGHES v. REES.

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THIS was a rule calling upon a sheriff to shew cause why an attachment should not issue against him for not making in due time a return to a writ of *venditioni exponas*. A *fi. fa.* having been issued and duly returned, a writ of *venditioni exponas* was issued on the 31st of *July*, and on the 1st of *September*, an order of a judge to return it in eight days was served on the sheriff. No return was made in the month of *September*. On the 20th of *November*, the present rule was moved for, previously to which the sheriff had made his return, and had paid the produce of the sale into the hands of the plaintiff.

A writ of *venditioni exponas* forms part of a writ of *fi. fa.*, and if not returned in obedience to a judge's order, subjects the sheriff to an attachment under Rule 13 *Mich. Term*, 3 *Will.* 4.

Jervis shewed cause.—The sheriff has not rendered himself liable to attachment, as he has been guilty of a nominal default only. This is merely a question of costs. The plaintiff should have applied to the sheriff for his costs in the first instance, and ought not to have brought him into Court; and as he has not taken that step, the sheriff is entitled to the costs of the present application.

R. V. Richards, contra.—The sheriff is liable to an attachment under the rule 13 *Mich. Term*, 3 *W.* 4 (a), made in pursuance of 2 *Will.* 4, c. 39, s. 15; since it is plain from the case of *Charter v. Peeler* (b), and *Milton v. Eldrington* (c), that a writ of *venditioni exponas* forms part of a *fi. fa.*; otherwise the writ of error, sued out subsequently to the writ of *fi. fa.*, but before the writ of *venditioni exponas*, would have been a *supersedeas* to the latter writ.

Per Curiam.—We think Mr. *Richards* has put the right construction upon the rule of Court, and that a *venditioni exponas* forms part of the writ of *fi. fa.*, since it directs the sheriff to execute the latter writ in a proper manner. The sheriff, in this case, has been guilty of a default, and it was his duty to be regular, otherwise the proceedings of the Courts would fall into contempt. At the same time, the plaintiff would have acted more candidly if he had applied to the sheriff for his costs instead of coming to this Court; although certainly he was not bound to do so. This rule will be discharged, but the sheriff must pay his own costs, and the costs of this application.

Rule discharged accordingly.

(a) "It is further ordered, that in case a judge shall have made any order in the vacation, for the return of any writ issued by authority of the said Act, or any writ of *ca. sa.*, *fi. fa.*, or *elegit*, on any day in the vacation, and such order shall have been duly served, but obedience shall not have been paid thereto, and the same shall have been made a rule of Court in the Term then next following, it shall not be necessary

to serve such rule of Court, or to make any fresh demand of performance thereon, but an attachment shall issue forthwith for disobedience of such order, whether the thing required by such order shall or shall not have been done in the mean time."

(b) *Cro. Eliz.* 597.

(c) *Dyer*, 99, a. See also *Tocock v. Honyman*, *Yelv.* 6.

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JONES v. WILLIAMS.

The plea of Not Guilty is a good plea to an action by a landlord on 11 Geo. 2, c. 19, s. 3, for assisting a tenant in the fraudulent removal of his goods.

DEBT, by a landlord, on the 11 *Geo. 2*, c. 19, s. 3, against the defendant, for assisting the tenant fraudulently to carry away his goods from the premises. *Plea*, Not Guilty. At the trial, before *Vaughan, J.*, at the *Merionethshire* Summer Assizes, 1838, the defendant proposed to prove that he and his brother, together with the tenant, were jointly entitled, under the will of a relation, to certain property. That this property was divided, and that the goods which the defendant had removed were the shares which had been assigned to him and his brother. This evidence was objected to, but the learned judge received it, and a verdict was found for the defendant, with leave to the plaintiff to move to enter a verdict for him for 144*l.*, if the Court should be of opinion that the defendant could not avail himself of his defence under the plea of Not Guilty.

Jervis now moved accordingly.—It must be admitted, since the case of *Spencer v. Swannell* (a), that this is a penal action. But the question is, whether the present plea is given by the 21 *Jac. 1*, c. 4, s. 4, since it is clearly not given by the 11 *Geo. 2*, c. 19. It is submitted, that the words of the fourth section do not apply to a case like the present; for they resemble the words of the second section, which have been held to apply only to actions at the suit of relators, informers and promoters.—[*Parke, B.*—We held, in *Spencer v. Swannell*, that the fourth section applied to all penal actions.—*Lord Abinger, C. B.*—The only question is, whether the Statute of *James* is confined to penal actions created before the passing of that Act.]—He cited *Coppin v. Carter* (b), and the judgment of the Court in *Faulkner v. Chevell* (c).

Cur. adv. vult.

The judgment of the Court was afterwards delivered by

LORD ABINGER, C. B.—The question in this case was, whether the plea of Not Guilty was a good plea to an action for assisting a tenant in the fraudulent removal of his goods to prevent a distress. We are of opinion that this case is governed by the decision of this Court in *Spencer v. Swannell*, and that the plea is good. The fourth section of the Statute of *James* applies to all subsequent Statutes, and therefore, the new rules do not prevent the general issue from being pleaded in penal actions created subsequently to that Statute. The rule will, therefore, be refused.

Rule refused.

(a) 3 *Mee. & W.* 154; 1 *Horn & Hurst*. 56. (c) 5 *Ad. & Ell.* 220; 2 *Har. & Woll.* 183.

(b) 1 *Term R.* 462.

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THE declaration stated, that before and at the time of the making of the agreement, and promise of the defendant thereafter mentioned, a certain action had been brought, and was then depending in the Common Pleas at Lancaster, wherein the present defendant was plaintiff, and the present plaintiff defendant; that it was then agreed between the parties to leave the said action to the arbitration of A., B., and C., and to perform and keep the award of the said arbitrators. That it was further agreed that the costs of the said reference and award should abide the event of the award. The declaration then stated, that the arbitrators awarded that the present defendant was not entitled to recover in the said action against the present plaintiff, and that the present defendant had not, at the time of commencing the said action, or at any time afterwards, any cause of action against the present plaintiff. That thereby, the event of the said award was in favour of the present plaintiff, that the plaintiff's costs of the said reference and award were taxed and allowed, and that they were not paid by the defendant, but were still due.

The third plea traversed the taxation of the costs of the reference, and of the award.

The fourth plea stated that the action in the Court of Common Pleas at Lancaster, in the declaration and agreement of reference mentioned, was an action of debt for money paid, money lent, and on an account stated, to which the defendant pleaded *nunquam indebitatus*, and a set-off; that the plaintiff joined issue on the first plea, and traversed the set-off; that the said issues were matters to be decided and awarded upon by the arbitrator; that the said arbitrators did not arbitrate or award on the said issues, or either of them, except as in the declaration mentioned, by means of which the award in the declaration mentioned was uncertain, not final and wholly void. *Verification.*

Replication, to the last plea, that the issues in that plea mentioned were not matters to be awarded upon by the said arbitrators, otherwise than by the reference in the declaration mentioned, and that the arbitrators were not, during the reference, requested by the defendant to award specifically on the issues in that plea mentioned. *Verification.*

To the third plea there was a demurrer, assigning for causes that the plea traversed the averment in the declaration of the taxing of the plaintiff's costs of the reference and award, which was an immaterial allegation, and that the plea contained no defence to the action; that the declaration averred that plaintiff had incurred and paid, and became liable to pay certain costs of the reference and award, of which the defendant had notice, and that the plea ought to have put some of those matters in issue; that even if any taxation of those costs were necessary, it was the defendant's duty to have procured such taxation, and that he could not take advantage of his own default, which, by his third plea, he had attempted to do.

Joinder in demurrer. To the replication to the last plea there was a demurrer, assigning for causes that the replication was argumentative, hypothetical and uncertain, and that it was double in stating two distinct matters of defence; first, that the issues were not matters referred, except as in the

Debt for money paid, money lent, and on an account stated. *Pleas, nunquam indebitatus, and set-off.* Before trial, the parties agreed "to leave the action to the award of A., B., and C., and that the costs of the reference and award should abide the event of the said award." The arbitrator, who was not requested to award on each issue, awarded that the "plaintiff in the action below was not entitled to recover in that action, and that he had not, at the time of commencing the action, or at any time afterwards, any cause of action against the defendant."

An action having been brought to recover the costs of the reference and award:—*Held*, first, that if it was intended that the arbitrator should award on each issue, he should have been requested so to do; *secondly*, that the arbitrator had determined the action.

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declaration mentioned; secondly, that the arbitrators were not specifically requested to award on each issue.

W. H. Watson, in support of the demurrer to the third plea, and of the replication to the last plea. The costs which the plaintiff is seeking to recover, are not the costs of the cause, but the costs of the reference and award. They do not depend upon the particular issues, but in order to entitle the plaintiff to them, it is only necessary to establish that there is an event upon which they arise. The costs of the reference and of the award are materially different from the costs of the action. Before the late rule of *H. T.*, 2 *Will.* 4, c. 74, when a verdict was found for the defendant upon the plea of *non assumptis*, the finding upon the plea of set-off became immaterial, and it was customary to discharge the jury as to such issue. But since that rule, the costs must be taxed on each issue, and it is for that purpose alone that there must be a distinct finding. The arbitrator, by determining that the defendant had not, at the time of the commencement of the action, or at any time afterwards, any cause of action against the plaintiff, has virtually and substantially found all the issues for the plaintiff, *Daubuz v. Rickman* (a). As the arbitrator was not required by the defendant to award specifically on each issue, he was not bound so to do. The replication has been framed with reference to the decision of this Court in *Dibben v. The Marquis of Anglesea* (b). There, by an order of *Nisi Prius*, three actions, and all antecedent causes of action, between the parties were referred to the decision of an arbitrator. The first was an action on the case brought by *D.* against *A.* for disturbance of common; the second was an action of trespass, *quare clausum fregit*, by *A.* against *D.* and *P.*; and the third was an action of trespass by *A.* against *P.* *D.* and *L.*, which had not proceeded further than the pleas. By the terms of the submission, any other persons claiming rights of common over the *locus in quo*, and particularly one *H.*, under whom the defendants justified in some of the pleas in the actions of trespass, were to be at liberty to become parties to the reference, and the object of the reference was declared to be for the purpose of ascertaining, securing and regulating the rights of the commoners, and the extent of certain woods and coppices, as far as concerned the parties to the reference. In the action on the case, Not Guilty was pleaded. In the first action of trespass, the defendants pleaded Not Guilty, and several other pleas, upon which issues were joined. In the other action of trespass, Not Guilty, and pleas justifying the trespasses were pleaded, but upon which no issue had been joined at the time the matter was referred. In the action on the case, for disturbance of common, the arbitrator awarded that a verdict should be entered for the plaintiff on certain counts of the declaration. In the action of trespass, which was at issue, he found that the defendants were not guilty of the trespasses, and in the other, that the plaintiff had no cause of action against the defendants. The arbitrator took no notice of the other issues, but, in pursuance of the terms of the submission, declared by his award what the rights of the parties were as to the enjoyment of the common, and inclosing of the woods in future. He then awarded that *A.*, who was the defendant in the first-mentioned action, and the plaintiff in the other two,

(a) 4 Dowl. 129; 1 Hodges, 75; 1 Scott, 564. (b) 2 Cr. & Mee. 722.

should pay all the costs of the reference and award. It was held, first, that the award was final, and that all the matters material to the determination of the causes were sufficiently disposed of. Secondly, that the arbitrator, not having been requested to decide on the other issues with reference to the costs, he was not bound to do so. There it was considered, that the finding on all the issues could only be material with respect to the question of costs. *Eardley v. Steer* (c), is an authority to shew that, in this case, the event is sufficiently determined in favour of the defendant. There, the cause, and all matters in difference, were referred to an arbitrator, the costs to abide the event of the award. The defendant had a cross demand for a larger amount than the plaintiff claimed in the action. The arbitrator awarded that the action should cease and be no further prosecuted; that, on the balance of accounts, 681*l.* was due from the plaintiff to the defendant, and that the plaintiff should pay that sum to the defendant; and the Court held, that the suit was definitely determined in favour of the defendant. So here, the award is tantamount to a finding for the defendant upon the general issue. It is not indispensably necessary that an arbitrator should award on each issue, if his intention as to each of them be sufficiently clear from the general language of the award, *Hunt v. Hunt* (d), *Moore v. Bullin* (e)

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Crompton, contra—The third plea is good; it traverses the only allegation which shews that the defendant was liable to pay the costs of the reference and the award. That, then, is a material allegation.—[*Parke, B.*—It would have been sufficient to have stated in the declaration that the award was in the plaintiff's favour.]—The amount to be recovered depended upon the taxed costs, and the plaintiff could have no claim until they were ascertained, *Sadler v. Robins* (f), *Bigland v. Skelton* (g). Secondly, the replication is bad. Where an action in which several issues are raised is submitted to arbitration, the arbitrator is bound to award on each issue. The costs of the reference and award are to abide the event of the award; that is, the event of all the issues. It is well established that the "event," does not mean the general result, but the legal event. In *Norris v. Daniel* (h), a cause (the declaration in which contained eight counts), and all matters in difference between the plaintiff and defendant were referred; the costs of the cause, and of the reference and award relating thereto, to abide the event. The arbitrators found that the plaintiff had good cause of action, in respect of the matters charged in five of the counts, and awarded 5*l.* damages, and directed that no further proceedings should be had in the cause; but made no specific award as to the three remaining counts, and it was held that the award was not final, there being no determination as to the three last-mentioned counts, and consequently no legal event as to them to authorize the taxation of costs. This doctrine is supported by the case of *Woof v. Hooper* (i). It is said that, before the late rule this question did not arise, but it is submitted that, since that rule, there must be a determination on each particular issue. A cause of action is not barred by a set-off, but if the

(c) 2 C. M. & R. 327; 4 Dowl. 423.

(d) 5 Dowl. 442; 1 Will. Woll. & Dav. 62.

(e) 2 Nev. & Per. 436; 1 Will. Woll. & Dav. 638; 2 Tidd. Prac. 981.

(f) 1 Camp. 253.

(g) 12 East, 436.

(h) 10 Bing. 507; 4 M. & Scott, 383; 2 Dowl. 798.

(i) 4 Bing. N. C. 449; 1 Arnold, 199.

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argument on the other side were to prevail, the defendant would not only lose the costs of the issue which should have been found for him, but would have to pay them. In *Dibbin v. Marquis of Anglesea*, the verdict was entered for the defendants on the general issue; consequently, the other issues became immaterial. Upon this award it is difficult to say how judgment is to be entered. Two matters have been referred, first, whether there was a debt due from the defendant to the plaintiff, and secondly, whether the defendant had set-off against the plaintiff's claim, and the arbitrator, not having decided upon each, the award is not final.

W. H. Watson, in reply.

Cur. adv. vult.

LORD ABINGER, C. B., now delivered the judgment of the Court.—The question in this case turned upon the construction of an award. The cause of action was referred to arbitration, and the submission stated, amongst other things, that it was thereby agreed that the *costs of the reference and award should abide the event of the award*. The present action was brought to recover the costs of the reference and award, and the question was, whether or not the award was final. On the one hand, it was contended that the award was final, because it put an end to the action, and therefore, in effect, the plaintiff ought to be nonsuited. On the other hand, it was said that, as there were two pleas to the action, namely, the general issue and a set-off, because the arbitrator had not decided specifically upon both issues, he had not determined the action. We have taken time to consider our judgment, and have finally come to the conclusion, that, if it was intended that the arbitrator should find distinctly upon each issue, he ought to have been requested so to do. Here the costs of the reference and award abide the event of the award; then the arbitrator has determined the action by saying that the plaintiff had no right of action at all. The costs follow the event of the action itself, and not of any particular issue. To decide that the plaintiff had no right of action, is to determine the action, and the costs abide that event.

Judgment for the plaintiff.

ANDERSON v. FULLER.

The cause and all matters in difference, having been submitted to an arbitrator, with power to raise points of law, he found a verdict for the plaintiff, directing the damages to be reduced, if, upon certain facts stated by him, the

reduce the not consider the defendant liable to particular demands:—*Held*, that a motion to Court should damages must be made within the time limited for setting aside the award.

IN this case the jury found a verdict for the plaintiff, damages 2000*l.*, subject to a reference of the cause, and all matters in difference. The arbitrator awarded that the damages should be reduced to 254*l.* 10*s.*, and after reciting that he was empowered to raise points of law for the consideration of the Court, stated certain facts, and then awarded that if, upon those facts, the Court should be of opinion that the defendant was not liable to certain demands,

the damages should be reduced to 125*l.* 17*s.* The award was published in *Easter Term* last. A rule having been obtained in *Michaelmas Term*, calling upon the plaintiff to shew cause why the damages should not be reduced to 125*l.* 17*s.*,

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Talfourd, Serjt., and *Petersdorff*, shewed cause, and took a preliminary objection that the application came too late, since in substance it was a motion to set aside an award, and ought, therefore, to have been made before the last day of *Trinity Term*.

Kelly and *Godson*, *contrâ*.—This is not an application to set aside an award, but to alter, upon certain facts submitted to the Court, the sum found by the arbitrator to be due to the plaintiff. The arbitrator has, in fact, stated a special case for the consideration of the Court. The rule of time, therefore, as to setting aside awards, does not apply. It is sufficient if the motion is made within a reasonable time, or before any thing has taken place to alter the situation of the parties.

Per Curiam.—We are of opinion that an award has been made in this case, and that, in substance, the object of this application is to set it aside; for if the application had not been made, a verdict would stand for the plaintiff. The motion should, therefore, have been made within the time limited for setting aside an award. This is a reference of the cause and all matters in difference; and therefore by the practice of the Court, which is regulated by analogy to the Statute, this motion for altering the award should have been made in the Term after that in which the award was published. The application, therefore, is too late, not having been made in *Trinity Term*. The rule must be discharged, but without costs.

Rule discharged, without costs (*a*).

(*a*) There is a difference in the time allowed for setting aside awards, where the *cause* only is referred, and where the cause and *all matters in difference* are submitted to an arbitrator.

In the former case, the application to set aside an award must, in general, be made within the first four days of the Term following the publication of the award. See the elaborate judgment of *Coleridge, J.*, in *Allenby v. Proudlock*, 1 Har. & Woll. 358; 4 Dowl. 54. But this rule is not imperative, *Sherry v. Okes*, 1 Har. & Woll. 122; *Ramsthorn v. Arnold*, 6 B. & Cress. 629.

But where the cause and *all matters in difference* are referred, a motion to set aside the award may be made before the last day of the Term following the publication of the award, *Allenby v. Proudlock*, 1 Har. & Woll. 357; 4 Dowl. 54; *Moore v. Butlin*, 1 Will. Woll. & Dav. 638; 2 Nev. & Per. 463; *Hayneard v. Phillips*, 6 Ad. & Ell. 119; 1 Will. Woll. & Dav. 1. The authorities opposed to this rule, are, *Bor-*

rowdale v. Hitchener, 3 B. & Pull. 244; *Thompson v. Jennings*, 10 B. Moore, 110; *Ramsthorn v. Arnold*, 6 B. & Cress. 629; 9 D. & Ry. 556; and *Lyng v. Sutton*, 2 Hodges, 106; 5 Dowl. 39.

The decision in *Borrowdale v. Hitchener* is extra-judicial, on the grounds stated by *Coleridge, J.*, in *Allenby v. Proudlock*. With regard to the decision in *Thompson v. Jennings*, the same learned judge observes, that it was founded on the authority of cases which proceeded only on the ground of a *verdict* having been taken. The decision, *Ramsthorn v. Arnold*, was extra-judicial, as an entire Term had elapsed since the publication of the award, without any motion having been made to set it aside. It is also admitted by *Cross*, Serjt., *arguendo*, that the motion would have been in time if made within the Term following the publication of the award. And it is to be observed, that the reporter, in his marginal note, has confined the decision of Lord *Tenterden* to the case where a *cause* is referred.

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In *Lyng v. Sutton*, the case of *Allenby v. Proudlock* was not cited, nor was the attention of the Court drawn to the distinction between the reference of a cause, and of a cause and *all matters in difference*. The case of *Lyng v. Sutton* must, therefore, be considered as overruled by the decision in *Moore v. Bullin*, where it was cited, and also by *Hayward v. Phillips*.

It does not appear, from the case of

Muskelbrook v. Dunkin, 9 Bing. 605, 2 B. Moore, 740, whether the reference was of the cause only, or of the cause and *all matters in difference*; if the reference was of the cause only, the case confirms the decision of *Patteson, J.*, in *Sherry v. Okes* (*supra*), that the rule as to time is not imperative; if of the cause and all matters in difference, the case is in accordance with all the recent authorities.

JACKSON v. COOPER.

Where a judgment has been obtained against a defendant, and a *ca. sa.* lodged at the sheriff's office, but the day of returning it has not arrived, the defendant is not entitled to his discharge under the 1st & 2d Vict. c. 110, and therefore, the Court will not order an *exoneretur* to be entered on the bail-piece.

IN this action the bail had obtained a rule to shew cause why the defendant should not be at liberty to put in a common appearance, and why an *exoneretur* should not be entered upon the bail-piece, and why, in the mean time, all proceedings against them should not be stayed. The defendant was out on bail on the 1st of October. Judgment was afterwards signed, and a writ of *ca. sa.* to fix the bail was lodged in the sheriff's office, but it had not remained there four days, nor was it returnable at the time when this rule was obtained.

Gurney shewed cause, and contended that the bail were not entitled to be discharged, since their prisoner, the defendant, was to be considered in custody on final process.

Shee, contrâ.—The bail are entitled to be discharged, on the principle acted upon by the Court of *Common Pleas* in *Bateman v. Dunn*. They are not yet fixed, the writ of *ca. sa.* not having lain four days, nor made returnable before this rule was moved for. Indeed, a writ of *ca. sa.* to fix the bail, cannot be sued out returnable immediately, *Kemp v. Hyslop* (a). The defendant, on being rendered by his bail, would be entitled to his discharge under 1 & 2 Vict. c. 110, s. 7 (b), as he must be considered in custody on *mesne process*; and therefore, the bail make this application to avoid the expence of rendering him.—[Lord Abinger, C. B.—Is the defendant entitled to his discharge? Suppose he had gone to prison for want of bail, and had

(a) 4 Dowl. 687; 1 Gale, 438; 1 Mee. & Wel. 58; 1 Tyr. & Gr. 77.

(b) The sections of 1 & 2 Vict., c. 110, applicable to this case, are the first, second, and seventh.

The first section enacts "That from and after the time appointed for the commencement of this Act, no person shall be arrested on *mesne process* in any civil action in any inferior Court whatsoever, or (except in the cases and in the manner hereinafter provided for), in any superior Court."

By the second section, it is enacted,

"That all personal actions in Her Majesty's superior Courts of law at Westminster, shall be commenced by writ of summons."

The seventh section enacts, "That every prisoner who, at the time appointed for the commencement of this Act, shall be custody upon *mesne process*, for any debt or demand, and shall not have filed a petition to be discharged under the laws now in force for the relief of insolvent debtors, shall be entitled to his discharge upon entering a common appearance to the action."

remained there without making any application for his discharge until after judgment, could you say he was in custody on *mesne process*?]—For the purposes of this Act, he may be said to be in custody on *mesne process* until he is charged in execution.—[*Alderson*, B.—Your argument is, that he is in custody on *mesne process* when he is out on bail; I doubt whether that is the case when a *ca. sa.* has been lodged against him.—*Parke*, B.—Suppose the defendant, on the 1st of *October*, had been in the custody of the Warden, without having been charged in execution; would he not have been in custody on *mesne process*? and if so, is he not, within the equity of this Act, in the same situation now? My doubt is, whether he can be said to be in execution on final process, until he is delivered into the hands of the sheriff.]

Cur. adv. vult.

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On a subsequent day, the judgment of the Court was delivered by

PARKE, B.—There were two cases which turned upon the construction of the Act 1 & 2 *Vict.* c. 110, for abolishing arrest on *mesne process*, and which stood over to enable us to confer with the judges of the *Common Pleas*, with a view to an uniformity of decision upon the construction of that Act. In one of these cases an application was made to enter an *exoneretur* on the bail-piece, the defendant being out on bail, and a *ca. sa.* to fix the bail having been lodged, but not being returnable at the time of the application. In the other case the defendant applied to have a sum of money, which he had paid into Court before the 1st of *October*, returned to him, being ready to put in bail, and to be rendered by them, in order to take the opinion of the Court as to his right to be discharged. The sections of the Act on which these applications were made, are the first and seventh. The first section enacts, "That from and after the time appointed from the commencement of this Act, no person shall be arrested upon *mesne process* in any civil action in any inferior Court whatsoever, or (except in the cases and in the manner herein-after provided for), in any superior Court." This section applies to cases where, after the commencement of the Act, arrest has been adopted as a first process, and not where defendants have been arrested before, and have remained in custody after the passing of the Act. The parties, therefore, are not entitled to be discharged under the first section. The question then, is, whether they are entitled to be discharged under the seventh. That section enacts, "That every prisoner who, at the time appointed for the commencement of this Act, shall be in custody for any debt or demand, and shall not have filed a petition to be discharged under the laws now in force for the relief of insolvent debtors, shall be entitled to his discharge upon entering a common appearance to the action." The judges of the *Common Pleas* have put a liberal construction upon this section, in order to carry into effect the principle of the Act, and have held that a party need not have been in actual custody when the Statute came into operation, but that he must be in custody, in some sense, when he applies for his discharge. On this ground, they have released persons who, having been arrested on *mesne process*, were out on bail at the time of their application to be discharged; the object being to save the expence and trouble of a surrender, and of applications to enter an *exoneretur* on the bail-piece, and to discharge the prisoner under this Act (c).

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This rule has been extensively acted upon at chambers, and we should have been willing to apply it to the latter of these cases had it been possible. But we think that a party who, before the 1st October, has paid money into Court, cannot, in any sense, be said to be in custody, so as to be entitled to relief under the 7th section. The rule of Mr. Corrie must, therefore, be discharged. In the other case we cannot relieve the bail *per saltum* in the manner suggested, for we are not sure that the defendant is in a situation to be rendered; and if he were, though he might be in custody on *mesne process*, still he could be charged in execution immediately; and if he were surrendered to the sheriff, he would be in custody in execution. Both rules, must, therefore be discharged, but without costs.

Rules discharged without costs.

REYNOLDS v. SIMMONDS.

The *habeas corpus ad satisfaciendum* is not *mesne process*, and a prisoner brought up by it to be charged in execution, is not entitled to be discharged under 1 & 2 Vict. c. 110, s. 6.

W. H. WATSON moved for a rule to shew cause why the defendant should not be discharged out of custody, under the 6th section of 1 & 2 Vict. c. 110, for abolishing arrest on *mesne process*. The defendant was brought up by *habeas corpus ad satisfaciendum*, to be charged in execution in a suit, in which he was not in custody. *Watson* contended that the *habeas corpus* was a species of *mesne process*.

Per Curiam.—A *habeas corpus ad satisfaciendum* is not *mesne process*, it is in the nature of final process, being a step towards execution.

Rule refused.

PATRICK v. COLERICK.

Trespass for breaking and entering the plaintiff's close, and taking his straw. *Pleas*: first, not guilty; second, that the straw was not the property of the plaintiff; third, that the defendant being possessed of certain straw, the plaintiff carried it away, and placed it upon his own close; and that the defendant quietly entered the close to retake it. Issues were taken on the first and second pleas; to the last there was a demurrer. At the trial the plaintiff had a verdict on the first issue, with one shilling damages; the defendant had a verdict on the second issue. The judge did not certify under the 22 & 23 Car. 2, c. 9, s. 136. The demurrer was afterwards argued in *Easter Term* of this year (a), when judgment was given for the defendant and placed it upon his own close; and that the defendant entered the close to retake it. A verdict was found for the plaintiff on the first issue, and for the defendant on the second. The third plea was demurred to, and judgment was afterwards given for the defendant. The judge did not certify under the 22 & 23 Car. 2, c. 9.

Held, that as the plea of not guilty might be a statutory plea, under which the title to the freehold might come in question, that the plaintiff was entitled to no more costs than damages on the issue found for him.

(a) See the case, *ante*, p. 125.

ant. The Master refused to allow the plaintiff the costs of the issue of Not guilty.

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F. V. Lee had obtained a rule, calling upon the defendant to shew cause why the Master should not review his taxation, and allow the plaintiff the costs of the issue that had been found him. He cited *Bird v. Higginson* (b), and *Hart v. Cutbush* (c), as authorities to shew that a party who has failed upon issues going to the whole cause of action, is, nevertheless, entitled to the costs of the issues on which he has succeeded.

Talfourd, Serjt., shewed cause, and contended that that plaintiff was not entitled to the costs of the issue found for him; for as the plea demurred to went to the whole cause of action, the jury ought to have assessed contingent damages only. That the present form of action was one in which the freehold might come in question; and as it did not appear from the record that it had come in question, the plaintiff was not entitled to costs, without the judge's certificate.

F. V. Lee, contra.

PARKE, B.—The plaintiff in this case is entitled to no more costs than damages. We thought, at first, that the plea of Not guilty, only put in issue the act of trespass, and if that had been so, the plaintiff would be entitled to the full costs of the issue of Not guilty. But as this may be a statutory plea of Not guilty, under which the title to the freehold might come in question in this action, and there is nothing on the record or elsewhere to show that it did so come in question, the plaintiff is entitled to no more costs than damages; and this rule must be discharged.

ALDERSON and GURNEY, Bs., concurred (a).

Talfourd, Serjt., then applied for costs.

ALDERSON, B.—As this application is in the nature of an appeal, it is but fair that the party who has appealed unsuccessfully, should pay the costs.

Rule discharged with costs.

(b) 5 Adol. & El. 83; 2 Har. & Woll. 278.

(c) 2 Dowl. 456.

(a) Lord Abinger, C. B., was absent.

NYAS v. MILTON.

W. H. WATSON moved for a rule to shew cause why the prisoner should not be discharged out of custody, under 1 & 2 Vict. c. 110, s. 7. The defendant had been arrested in *May* last, upon a *capias ad respondendum*, and had escaped out of the custody of the officer. An escape warrant

A party, who being arrested on *mesne process* before the 1st October, makes his escape, and is after that

day retaken on an escape warrant, is not entitled to be discharged under 1 & 2 Vict. c. 110.

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was immediately granted, by virtue of which he was arrested the 15th November. *Watson* contended that he had been virtually in custody since *May*, and therefore was as much entitled to his discharge as if he had remained in actual custody after the commencement of the Act.

Per Curiam.—A man who has escaped cannot be said to be in custody, within the seventh section, any more than one who has deposited money in lieu of bail, can be so considered (a). Nor is the defendant entitled to be discharged under the 1st section, since that clause applies only to cases of arrest at the commencement of the suit.

Rule refused.

(a) See the case of *Harrison v. Dickenson*, ante, 353.

HODSON v. PENNELI

A plea delivered the day after the time for pleading has expired, but bearing date of the previous day, is not a nullity, but merely an irregularity.

THE defendant having obtained further time to plead, was ordered to deliver a plea on the 1st November. On the morning of the 2d, before the opening of the Judgment Office, he delivered a plea, dated of the previous day. Upon this the plaintiff signed judgment. A rule having been obtained calling on the plaintiff to shew cause why this judgment should not be set aside with costs,

Humfrey shewed cause.—This question arises under the first rule of *Hilary Term*, 4 Will. 4, which requires that "every pleading, as well as the declaration, shall be entitled of the day of the month and year when the same was pleaded, and shall bear no other time or date." This is a Parliamentary rule, made under the provisions of 3 & 4 Will. 4, c. 42, s. 1; and therefore any departure from it, renders proceedings not merely irregular, but absolutely void. There is no case exactly in point, but *Newnham v. Hanny* (a) approaches the present case. There, however, the party applying to set aside the declaration, on the ground of its having been delivered subsequently to the day of its date, himself chose to treat it as irregular, and not void. Besides, the rule that requires a declaration to be dated, is not a Parliamentary rule (b). The cases of *Wallace v. The Duchess of Cumberland* (c), and *Venn v. Calvert* (d), are also in point.

Chandless, *contra*, was stopped by the Court.

Per Curiam.—There is but little colour for saying that the rule of *Hilary Term*, which requires pleadings to be dated, is a Parliamentary rule. The precise point now before us has never yet been decided; but writs bearing different date from the day on which they are issued, are treated as irregular

(a) 5 Dowl. 259; 2 Har. & Woll. 303.

(b) Mich. T., 3 Will. 4, Reg. 15.

(c) 4 T. Rep. 370.

(d) *Ibid.* 578.

but not void. We think it would be more convenient to regard this error as an irregularity, than as a nullity. As this is the first occasion of such an application, the rule for setting aside the judgment will be made

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BADNALL v. HAYLEY.

IN this case a plaintiff being resident abroad, had been compelled to give security for costs, and *Badnall* and another had entered into a bond for this purpose. The suit had not terminated, but the plaintiff had become permanently resident in this country. Under these circumstances

Security for costs, given on the ground of the plaintiff's residing abroad, continues until the termination of the suit, even after he has become a permanent resident in this country.

Whateley moved for a rule to shew cause why the bond should not be delivered up to be cancelled. He admitted that there was no precedent in favour of his application.

Per Curiam.—We cannot grant a rule in this case: the security for costs was given at a time when the defendant had a right to require it; and it must continue as long as the suit lasts.

Rule refused.

BLOW v. WYATT.

THIS was a rule, calling upon the plaintiff to shew cause why he should not pay the defendant the costs of the day, for not proceeding to trial. The plaintiff entered the cause at the Assizes; and the defendant, who had taken down the record by proviso, entered his cause beneath the entry of the plaintiff. At the trial the plaintiff withdrew his record, and the defendant afterwards agreed that his cause should be made a remanet.

A defendant took down a record by proviso, and entered the cause under the entry of the plaintiff. The plaintiff withdrew his record, and the defendant afterwards agreed that his cause should be made a remanet:—*Held*, that the defendant was not entitled to the costs of the day.

Channell shewed cause, and contended that as the defendant might have tried the cause upon his own record, he was not entitled to the costs of the day.

Turner, contra.—The default in this case has been committed by the plaintiff, since the trial ought to have been by his record, *The King v. Macleod* (a). In the *Common Pleas*, costs were allowed for not going on to trial, though the defendant had entered a *ne recipiatur*; and they are payable in that Court as well as the *King's Bench*, where the cause goes off for want of jurors, neither side having prayed a tales (b).—[*Gurney, B.*—That is not the practice of this Court.]—And where both the plaintiff and defendant gave

(a) 2 East, 206, note.

(b) 2 Tidd. Pr. 759, 9th edit.

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notice, but neither of them went on to trial, it was holden that they were both entitled to costs (c).

PARKE, B.—The defendant might have tried the cause, and thereby have avoided all the consequences of the plaintiff's withdrawing the record. As it is, he agrees that the cause shall be made a remanet, and that makes a difference in the case. This rule must be discharged.

Rule discharged.

(c) 2 Tidd. 759.

HODSOLL v. WISE.

Where, in an order of reference, a judge ordered, that the parties to the writ (if the arbitrator should think fit), and their witnesses, should be examined upon oath, to be sworn before him or some other judge of the Exchequer, or commissioner duly authorized:—*Held*, that the arbitrator had the power of administering an oath to the witnesses.

WARREN on a former day had obtained a rule, calling upon the plaintiff to shew cause why the certificate of the arbitrator in this cause should not be set aside, on the ground of his having improperly sworn the witnesses. The cause was referred, under the following order of *Bolland, B.*: "And by the like consent, I further order that the parties to this suit (if the said arbitrator shall think fit), and their respective witnesses, shall be examined upon oath, to be sworn before me, or some other judge of her Majesty's Court of *Exchequer*, or commissioner duly authorized." It was objected at the reference that under this order the arbitrator had no power to administer an oath to the witnesses. The arbitrator overruled the objection, and the witnesses were sworn.

Humfrey shewed cause.—The Act of Parliament, 3 & 4 *Will. 4*, c. 42, s. 41, empowers the arbitrator to administer an oath to the witnesses; and it is not in the power of parties to set aside its provisions, except by express agreement. No such agreement has been made here. According to the defendant's construction of this order of reference, no judge in *Westminster hall*, except a baron of the *Exchequer*, could have administered an oath in this case.

Warren, contra.—This order of reference contains an agreement that witnesses are to be sworn in one only of the modes prescribed by the Act of Parliament; and such an agreement is neither illegal nor invalid. It may have been thought, that an oath taken before this Court would make more impression upon a witness than one administered in the chambers of an arbitrator. At all events, the arbitrator was bound to follow the agreement of the parties, and in this case has exceeded his authority.

PARKE, B.—This order of reference ought not to have been drawn up as it now stands. The question is, whether it limits the power given to the arbitrator by Act of Parliament. I should have thought it would have had that effect, if the word "only" had been inserted after the description of the persons who were to administer the oath. But looking to the fact, that the arbitrator may examine, if he thinks fit, the parties upon oath, I consider that

this agreement, instead of limiting, gives him additional power. This rule must, therefore, be discharged; and as parties must not take the opinion of the Court at the expence of their adversaries, it must be discharged with costs.

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ALDERSON, B.—Looking to the terms of this Act of Parliament, and the order of reference, I am clearly of opinion that it would have been competent for a judge, a commissioner, or the arbitrator, to administer an oath to the witnesses in this case.

GURNEY, B., concurred (a).

Rule discharged with costs.

(a) Lord Abinger, C.B., was absent.

CAMDEN v. FLETCHER, Executor, &c.

ASSUMPSIT for work and labour, and on an account stated. *Pleas:*

Non assumpsit, ne unques executor, and plene administravit. The defendant was charged as executor *de son tort*. It appeared that the deceased was his mother-in-law, and had resided at his house up to the time of her death. She had an annuity of 15*l.*; 7*l.* 10*s.* of which was due at her decease. She left no property. The defendant applied to the grantor of the annuity for the sum of 7*l.* 10*s.* for the purposes of the funeral, and having obtained the money, applied 5*l.* 15*s.* in payment of the funeral expences, declaring that he would pay over the residue to the creditors of the deceased. At the trial, before the under-sheriff, the jury were directed to consider whether the defendant was executor *de son tort* or not; and they found a verdict for the plaintiff, damages 8*l.* 3*s.*

Where a party is charged as executor *de son tort*, for having received a debt of the deceased to defray the funeral expences, it is a question for the jury whether he received a larger sum than was necessary for that purpose: if he did, he would be liable as executor *de son tort*.

F. V. Lee having obtained a rule, calling upon the plaintiff to shew cause why this verdict should not be set aside and a nonsuit entered, or why a new trial should not be granted, on the ground of misdirection,

Martin shewed cause, and contended that the defendant became executor *de son tort*, by receiving a debt due to the intestate, *Com. Dig.* "Executor *de son tort*, c. 1. *Read's Case* (a).—[*Parke, B.*—That rule proceeds on the ground of the defendant having appropriated the goods of the deceased to his own use.]

F. V. Lee, contrâ.—The defendant has not made himself an executor *de son tort*, by defraying the funeral expences of the deceased, 1 *Williams on Executors*, 139. At all events, the direction of the under-sheriff was wrong, for he told the jury to consider whether the defendant was or was not executor *de son tort*. It appears from *Williams on Executors*, p. 141, that "the

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question whether executor *de son tort* or not is a conclusion of law, and ought not to be left to the jury; whether the party did certain acts, is, indeed, a question for a jury; but when these facts are established, the result from them is a question of law." He cited *Serle v. Waterworth* (b).

LORD ASINGER, C. B.—The under-sheriff should have left it to the jury to say whether the sum of 7*l.* 10*s.* was more than was necessary for the payment of the funeral expences; and had I been one of the jury, I should have thought it was not too large a sum. The point being whether the defendant received the sum in question as of right, or merely for the purpose of burying his mother-in-law; and it being clear that he received it for the latter purpose, the difference between the sum received and that paid for the funeral, was too small to warrant the jury in concluding that he acted as executor. The rule must be made absolute for a new trial, but without costs.

PARKE, B.—A man is not made an executor *de son tort* by paying reasonable funeral expences. If indeed the defendant received more money than was necessary for that purpose, he would become executor *de son tort*; but if he only took what the jury thought sufficient, then he would not be such executor. It was, therefore, a question for the jury, whether he took a larger sum than was necessary for the funeral expences.

GURNEY, B., concurred.

Rule absolute for a new trial, without costs (c).

(b) 4 *Mec. & W.* 9; *ante*, p. 281.

(c) *Alderson, B.*, was absent.

In Error from the Court of Exchequer.

June 16.

FRANCIS v. DOE, dem. HARVEY.

Ejectment. A mining Company, in which the defendant below was a partner, applied to, and became tenants to the lessor of the plaintiff in 1826, of certain premises. They were let into possession by him, and continued to occupy them during the term, paying him rent; and after receiving notice to quit, at the end of the term, made proposals to retake them. They had never given up possession of the premises. At the time of granting the lease, the lessor of the plaintiff had no legal estate in the premises, but merely an equitable interest in one moiety. At the date of the demise laid in the declaration, and also at the time of the trial, he was a partner with the defendant below in the Company, but was not so at the time of granting the lease.

Held, on a bill of exceptions to the ruling of the judge at the trial, *first*, that the defendant below was estopped from disputing the title of the lessor of the plaintiff. *Secondly*, that the lessor of the plaintiff was entitled to recover the entire premises.

EJECTMENT. The declaration contained two demises by the lessor of the plaintiff, *Collan Harvey*, of messuages, cottages, and stamping mills. The first demise was dated the 27th *March*, 1836, and the second, the 18th *January*, 1837. *Plea*: Not guilty. At the trial, before *Patterson, J.*, at the *Launceston* Summer Assizes, 1837, the lessor of the plaintiff proved that the defendant, on the 1st *January*, 1826, and from thence to the days of the several demises in the declaration, had been and still was a part-

ner and adventurer in the company of adventurers, working the Consolidated Mines, in the parish of *Gwennap*, in the county of *Cornwall*; and that the company at various times between *Lady-day*, 1826, and *Lady-day*, 1836, had paid rent to the lessor of the plaintiff, *Collan Harvey*, for the use and occupation of the premises in the declaration mentioned; and that such rent had been paid half-yearly, at *Michaelmas* and *Lady-day*, at the rate of 32*l.* per annum. It also appeared that on the 18th of *September*, 1835, the lessor of the plaintiff, had duly served upon the defendant a notice to quit the same premises. The notice was directed, "To the partners or adventurers of the Consolidated Mines, in the parish of *Gwennap*, in the county of *Cornwall*, and to every of them;" and required them to deliver up their premises on the 25th of *March*, 1836, provided the tenancy commenced on the 25th of *March* or otherwise, according as it commenced. That after the service of the notice and before the 25th of *March*, 1836, the company of adventurers made proposals, by letter, to the lessor of the plaintiff to retake the premises of him for another term of years, from and after the 25th *March*, 1836. The defendant gave in evidence an answer of the lessor of the plaintiff in a suit in *Chancery*, between the adventurers in the Consolidated Mines and the lessor of the plaintiff; in which answer the lessor of the plaintiff swore, that he had not, prior to 1826, or since that time, any legal estate or interest in the premises sought to be recovered, but had merely an equitable interest in one moiety; and that the legal estate and interest in the whole of the premises belonged to and was vested in one *J. W.*, in trust; as to one undivided moiety thereof, for the said *J. W.*; and as to the other moiety, in trust for the lessor of the plaintiff. It also appeared from the answer, that in 1826, in consequence of applications from the company of adventurers to the lessor of the plaintiff, it was agreed between the company and the lessor of the plaintiff, that the former should take of the latter the premises sought to be recovered, as tenants from year to year, at a yearly rent of 32*l.*, payable half-yearly, the tenancy to commence at *Lady-day*, 1826. It also appeared from the answer, that the company were accordingly let into possession of the premises, by the lessor of the plaintiff, in 1826, and had never since quit-
 ted the same or given up possession thereof. It was also proved, that at the date of the several demises in the declaration, and of the trial, the lessor of the plaintiff was a partner, or co-adventurer with the defendant, in the company of adventurers, in the Consolidated Mines; but it did not appear that he was such partner at the time of letting the premises to the defendant. Upon this evidence the defendant's counsel contended, that the lessor of the plaintiff was not entitled to recover any part of the premises, or that at least he could not recover more than a moiety. To this it was answered for the plaintiff, that inasmuch as it appeared by the evidence that the company had obtained possession of the whole of the premises mentioned in the declaration, from and under the lessor of the plaintiff as his tenants, that they could not dispute his title until they had given up the premises. The learned judge stated to the jury, that he was of opinion that the defendant took the premises in the declaration mentioned from the lessor of the plaintiff, as his tenant, and that he was not at liberty to dispute his title, notwithstanding that the lessor of the plaintiff, at the time of the trial, was an adventurer. That the lessor of the plaintiff was not proved to have disposed of his share as adventurer in the said company, but that his continuing to be an adventurer did

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not affect his right to recover. The jury found a verdict for the lessor of the plaintiff, upon which the counsel for the defendant tendered a bill of exceptions, which was sealed by the judge. A writ of error, having been thereupon sued out, the case now came on for argument. The following points were marked for argument by the plaintiff in error.

First, that as the lessor of the plaintiff below was a partner of the defendant below, and therefore jointly with him in possession of the premises sought to be recovered, that the defendant below was not estopped from shewing that the lessor of the plaintiff below had no legal title. Second, that the lessor of the plaintiff below being a partner of the defendant below, in possession of the premises jointly with him, was not entitled to recover against the defendant below in an action of ejectment.

Erle for the plaintiff in error.—The rule of estoppel does not apply to this case, for the lessor of the plaintiff was a co-tenant of the defendant, being jointly in possession, as an adventurer, of the premises sought to be recovered. The consent rule affords no proof of the defendant's being a trespasser before the commencement of the action, *Right v. Beard* (a). Secondly, the lessor of the plaintiff, is a co-partner of the defendant, and therefore cannot recover. It is clear from *Brown v. Hedges* (b), that one joint-tenant cannot bring *trover* against another, because the possession of one is the possession of both. And in *Holliday v. Cammell* (c), it was held, that the member of an Amicable Society entrusted with a box, containing the fund and bound to keep it safely, could not maintain *trover* against another member who had taken it from him. In this case, if any trespass has been committed the lessor of the plaintiff would be jointly liable with the defendant. He would be bound to pay his proportion, if the defendants were to sue him for contribution, and would be liable jointly with the defendant in an action for *meane* profits. He is, therefore, to all intents and purposes, a co-defendant, and cannot maintain the present action.

Montague Smith, contra.—The defendant is bound by this estoppel. It does not appear from the evidence that the lessor of the plaintiff was an adventurer at the time of granting this lease; and the effect of that instrument is not altered by his afterwards becoming a partner in the mining speculation. That act cannot make him a lessee. But even admitting him to be a co-adventurer at the time of granting this lease, and that he granted it to himself and others, the legal estate would not thereby pass out of him, *Harker v. Birkbeck* (d). It has been objected that the lessor of the plaintiff is a co-defendant, and therefore cannot recover: the answer to this objection is, that the only plaintiff on the record is *John Doe*. Indeed, the lessor of the plaintiff might have been actually named as defendant on the record, without any violation of the rule that the same party cannot be both plaintiff and defendant. The defendant has confessed an ouster, and therefore cannot take advantage of his being co-tenant of the plaintiff; for ejectment may be brought by one tenant in common against another, after an actual ouster; and a confession of ouster is in this case equivalent to an ouster in fact.

(a) 13 East, 210.
 (b) 1 Salk. 289.

(c) 1 T. Rep. 658.
 (d) 3 Burr. 1563.

Erle, in reply, cited *Aslin v. Parkin* (s), as shewing that the lessor of the plaintiff and the tenant in possession are substantially the only parties to the suit.

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Lord DENMAN, C. J.—In this case the company are estopped from disputing the title of the lessor of the plaintiff, as they have taken the premises from him: and the same rule holds with regard to every member of the company. Whether the parties to this suit are joint wrong doers, is a question that does not arise; as the plaintiff does not appear to have been a partner at the commencement of the lease, and was not in possession of the premises as one of the company. The judgment below will, therefore, be affirmed.

Judgment affirmed.

(c) 2 Burr. 668.

THICKNESSE v. The LANCASTER CANAL COMPANY.

THIS was an action on the case, tried before *Patteson, J.*, at the *Liverpool*

Spring Assizes, 1837, when a verdict was found for the plaintiff for the damages in the declaration, subject to a special case, which stated the following facts:—By an Act, passed in the 32d year of *Geo. 3*, certain persons were constituted a corporation, by the name of "The Company of Proprietors of the *Lancaster Canal Navigation*," for the purpose of making a canal from *Kirkby Kendal* to *West Houghton*. The Act contained no statement of any time within which the canal was to be completed. In 1816, the Company had carried their canal to a certain point, within four miles from the terminus of *West Houghton*. In 1835 they began to cut beyond that point, and it was this act which gave rise to the present action. The Company were empowered by the Act of Parliament to take such lands as should be convenient for the purposes of the Act, "making satisfaction to the owners or proprietors of, or persons interested in, the lands, tenements," &c. for any damage they might sustain by the execution of the powers of the Act; and in the event of any disagreement between the Company and the proprietors, or parties interested, certain commissioners were appointed to settle what sum was to be paid for the absolute purchase; and also what other distinct sum was to be paid for damages sustained by the owners or parties interested in

Where an Act of Parliament creates a Company for the execution of certain works, but does not specify any time for their completion, no limitation of time will be presumed, and the works may be completed at any period.

A canal Company was empowered by Act of Parliament to take lands, &c., "making satisfaction to the owners or proprietors of, or persons interested in the lands," &c., so taken, for any damages by

them sustained. By another clause it was enacted, that in the event of the Company, owners, or parties interested, not agreeing as to the sum to be paid for the absolute purchase of the land, certain commissioners were to settle what sum was to be paid for the purchase, and also what distinct sum was to be paid as a compensation to "parties interested." The Company purchased from Sir *R. H. L.* land, over which the plaintiff had a railroad, by way of easement. They entered upon the land in *December, 1834*, but did no injury to the plaintiff's railroad until *February, 1836*. The plaintiff gave no notice to the Company of his having any interest in the land, and nothing was paid to him by the Company as compensation.

Held, that the plaintiff was not entitled to compensation under the Act until he had sustained some actual injury; and that the Company were bound to give compensation at any time after the injury.

Held also, that the Company were entitled to enter upon the land before making compensation.

The plaintiff was also tenant to Sir *R. H. L.*, at a rent of 80*l.*, of other land, which he had underlet from year to year, at a rent of 60*l.*; but it did not appear at what times the two tenancies commenced, nor that the plaintiff had any reversion. This land was also sold to the Company by Sir *R. H. L.* The plaintiff made no claim to compensation, nor was any sum awarded to him.—*Held*, that the plaintiff did not show such an interest as entitled him to compensation.

Quære, whether a tenant from year to year, whose tenancy begins at *Michaelmas*, and who has underlet from year to year from *March*, at a higher rent than he pays to his own landlord is to be considered a reversioner.

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the land; and in the event of the owners or parties interested refusing to abide by the decision of the commissioners, the latter were to summon a jury to assess compensation. The plaintiff had an easement in a railroad, which ran over the land of Sir *R. H. Leigh*. This land the Company purchased from Sir *R. H. L.*, and entered upon it in *December*, 1834; but they did not remove the plaintiff's railroad, nor did any injury to his right, until *February*, 1836. The plaintiff gave no notice to the Company of his having any interest in this land, and no sum was awarded to him by the Company in respect of his interest.

The plaintiff was also tenant from year to year to Sir *R. H. L.*, at a rent of 80*l.*, of other land which he had underlet from year to year to one *Atherton* for 60*l.*: but it did not appear from the special case at what times the two tenancies commenced, nor was it stated that the plaintiff had any reversion. In *February*, 1835, this land was agreed to be sold by Sir *R. H. L.* to the defendants, and they commenced cutting through it in *April* following. The plaintiff did not claim any compensation from the Company in respect of his interest as tenant from year to year, nor was any distinct sum as damages awarded to him as a "party interested."

This action was commenced on the 7th *July*, 1836. The question submitted to the Court was, whether the plaintiff was entitled to recover upon all or any of the counts in the declaration. If the Court should be of opinion that the plaintiff was entitled to recover, the damages were to be referred; if the Court should think that the plaintiff was not so entitled, or that the action was brought too late, in that case a nonsuit was to be entered, or a verdict was to pass for the defendants.

Sir *W. W. Follett*, for the plaintiff.—The defendants were not entitled in 1835 to take land for their canal under an Act passed in the year 1792, having suffered an unreasonable period to elapse since their last time of working. In a private Act like the present, which is a bargain with the public, there must be some limit at which the powers of the Act, unless exercised, must be held to terminate. In other words, the Act must be carried into effect within a reasonable time from its enactment, or it will be deemed to have expired. If this were not the rule, the greatest injustice might be done; the present Company, for instance, which is a corporation, and therefore perpetual, might commence new works at the end of centuries, when the value of property would be changed, and the relations of parties altered; or they might begin their canal at the end of that time, although they had never taken a step before. The principles on which the Court of *Chancery* acted in *The Mayor of King's Lynn v. Pemberton* (a), and in *Blakemore v. The Glamorganshire Canal Navigation* (b), are applicable to this case. By a standing order of the House of Lords, a clause, compelling parties to complete their works within a limited time, is introduced into all Acts of Parliament. It must, therefore, follow, that it is an implied condition in all Acts like the present, that the objects of such Acts shall be carried into effect within a reasonable time, and that the question of the reasonableness of the time is to be determined by the Court.

Secondly, there was an irregularity in the mode of taking the plaintiff's railroad, since no compensation was awarded to him at the time of the taking, and the Act does not authorize him to demand compensation at any future time.

(a) 1 Swanst. 250.

(b) 1 Mil. & K. 154.

—[*Parke, B.*—How could the extent of the injury be ascertained at the time of the purchase; the plaintiff's railroad was not interfered with until long afterwards?—*Lord Abinger, C. B.*—The plaintiff might have obtained compensation as soon as he had sustained any damage. Compensation may be awarded at any time.]

Thirdly, the plaintiff had an interest as reversioner, and therefore was entitled to damages in respect of that interest, *Pike v. Eyre (c)*, *Curtis v. Wheeler (d)*, *Poultney v. Holmes (e)*.

Cresswell, for the defendants.—The answer to the first objection is, that the Act prescribes no limitation as to time; and that it is impossible for this Court to say what is or what is not a reasonable time for effectuating the purposes of the Act.

Secondly, the plaintiff was not entitled to compensation in respect of his right to make railroads, until the land was taken, or some actual injury done *Lee v. Milner (f)*, *Lister v. Lobley (g)*.

Thirdly, the plaintiff has parted with all his interest in the lease; he has nothing remaining, and therefore cannot be a reversioner.

Sir *W. W. Follett*, in reply.

LORD ABINGER, C. B.—The most important question for our consideration is, whether the Company were bound to complete their works within a reasonable time, or whether they were unlimited in that respect. The Act of Parliament contains no limitation as to time. It has been stated that one branch of the legislature invariably compels companies applying for an Act of Parliament, to complete their works within a reasonable period; but that circumstance throws no light on the question, except one, which is unfavourable to Sir *W. Follett's* argument, since it shows a belief that without that clause companies would be unrestricted in respect of time. But then, it is said, that where companies do not complete their works within a reasonable period, a Court of Equity will compel them. Without doubt, where certain lands are specified as liable to be taken by a company, who have carried their works to a certain point, and after a long period are tempted to extend them further, merely by some particular motive, there may be good ground for the interference of a Court of Equity; because a party must not lie still, beholding another incur expence, and then destroy all that that other has done. But Courts of Law must construe this Act of Parliament as they would the day after its enactment. The powers of many companies have subsisted for years, and still subsist, and we cannot hold that the authority of this company has determined, unless the legislature has expressly said so. The next point is, that the company have taken land, upon which there was a railroad of the plaintiff, and that he was entitled to damages in respect of this easement, even before he had sustained any actual injury. But we think that his claim to compensation must be made at the time of the injury. With regard to the question of tenancy, it does not appear from the case that the

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(c) 9 B. & Cres. 909.
(d) Moo. & Malk. 493.
(e) 1 Stra. 405.

(f) 2 Mee. & W. 824; 1 Mur. & Hurl. 275.
(g) 7 Ad. & Ell. 124; 1 Will. Woll. & Dav.

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plaintiff had such an interest as entitled him to compensation. If a party becomes tenant from year to year from *Michaelmas*, and lets to another from year to year from *March*, at a higher rent than he himself pays, he may perhaps, under such circumstances, have a reversion, for which he would be entitled to compensation. But it is sufficient to say that the present case raises no such question. It may be that the proprietor sold his land, promising his tenant that he should not be disturbed during his term; then if the tenant was not disturbed, he would not be entitled to compensation. Or it may be, that the company informed Mr. *Thicknesse* that they should not want the land until two years after the purchase; in that case also he would not be entitled to compensation. Our judgment must, therefore, be for the defendants.

PARKE, B.—I am of the same opinion. As the Act mentions no time within which its powers are to be exercised, we must hold that they still subsist, and that there is no implied limitation either at law or in equity, since it would be almost impossible to determine what is or what is not a reasonable time for the execution of the objects of the Act. It is next urged that the company were irregular, in entering upon land of Sir *R. H. Leigh* without first making compensation to the plaintiff in respect of his right to make a railroad over that land. I do not think, however, that the company were bound before they entered to buy up the plaintiff's rights. The sections of the Act oblige the company to purchase the interest of the owners in fee or for life, but they do not apply to easements. Parties in the situation of the plaintiff are entitled to compensation for any injury they may sustain, but they are not entitled to compensation prospectively, since the extent of damage cannot be ascertained until after the damage has been actually inflicted. The company may, therefore, enter upon the land before making compensation. The last count is framed on the ground of the plaintiff having a reversion, in respect of the tenancy between him and *Atherton*. Sir *W. Follett* has observed, that the possessor of the term is to be included in any bargain made by the owner with the company; and that unless that were the case, great injustice might be done to a tenant in possession under a long term of years: there would be great weight in that observation if the plaintiff had any reversionary interest here. But it is impossible to say upon this case that he has any reversion as against a stranger; he may have had some reversion as against his tenant, although that does not appear. But it is unnecessary for us to decide that point.

GURNEY, B., concurred (h).

Judgment for the defendants.

(h) *Alderson*, B., was absent.

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SPECIAL Case. The declaration stated, that *Edward Sheppard* was seised in fee of a certain messuage and premises, called the *Three Tuns Inn*, in the parish of *Hungerford*, in the county of *Wilts*; and that being so seised on the 25th *February*, 1782, he demised the said messuage and premises to *Charles Dalbiac* and others, in trust, for the inhabitants at large within the parish of *Hungerford*; and that the said *Charles Dalbiac* and others did accept and take of the said *Edward Sheppard* the said messuage and premises, which were intended to be converted into a poor-house, for the use of the said parish, to hold the same in trust as aforesaid for a certain term, which was then unexpired, upon and subject, amongst others, to the following terms (that is to say), that they the said *Charles Dalbiac* and others should keep the said messuage and premises in good and sufficient repair, during the said term. The declaration then stated, that the said *Charles Dalbiac* and others, on 25th *March*, 1782, entered upon the said messuage and premises, and became possessed thereof for the said term, as tenants to the said *Edward Sheppard*, upon the terms aforesaid, and that they promised to keep the said messuage and premises in good and sufficient repair during the said term. The declaration then averred, that the premises were converted into a workhouse, for the use of the said parish of *Hungerford*; that *Edward Sheppard* being seised of the reversion of the said premises, died on the 2d of *September*, 1800, leaving the plaintiff, *Margaret*, his daughter and his only child and heiress him surviving. That *Margaret* became seised of the reversion of the said premises, and being so seised, she, on the 21st of *June*, 1801, married the plaintiff, *Charles Alderman*, and thereupon the plaintiffs became and then were seised in fee, in right of the said *Margaret*, of and in the reversion of the said premises. The declaration then averred, that during the continuance of the said term, and after the 31st of *March*, A. D. 1819, to wit, on the 1st day of *April* in that year, the then churchwardens and overseers of the poor of the said parish of *Hungerford* entered upon the said demised premises, and became possessed thereof, for the use of the said parish, and then accepted the same for and on behalf of the said parish, upon the terms aforesaid; and the residue of the said term, then vested in the said churchwardens and overseers, and their successors, for and on behalf of the parish, according to the Statute in such case made and

By a written instrument, dated the 25th *February*, 1782, *E. S.* agreed to let to a committee, in trust for the parish of *H.*, certain premises, to be used as a poor-house, upon the following terms: "To hold unto the said committee, in trust as aforesaid, from the 25th day of *March* next coming, for the term of 99 years, at the clear yearly rent of 27*l.* payable half-yearly, by equal portions. And the said committee do hereby agree to pay the said rent accordingly; and also to pay and discharge all assessments and taxes whatsoever, with all quit-rents, &c. for and in respect of the said premises; and also to keep the premises in good and sufficient repair during the term. And the parties do agree that a lease and counterpart of the premises shall be prepared and executed on or

before the 1st *January* next ensuing, with covenants and agreements pursuant to the present contract; and such other general clauses as are usually contained in leases: Provided, that in case the said committee, or the major part of them, or their successors, shall think it more eligible to purchase in fee the said messuage and premises for the use of the said parish of *H.*, at the price of 420*l.*, that then he, the said *E. S.* shall accordingly convey the same premises in such manner as the counsel or attorney of the said committee shall advise and require." The churchwardens and overseers of *H.*, on behalf of the parish, entered upon the premises in question in 1819, and paid rent to the plaintiffs up to the year 1835, when the Poor Law guardians took possession of the premises. The plaintiffs became entitled to the reversion in 1801. The defendants were the churchwardens and overseers of the poor at the date of the action, but not at the time when the parish was in possession of the premises, and when the dilapidations accrued. An action having been brought against the defendants for a breach of the agreement to repair:—

Held, first, that the instrument operated as a present demise; and secondly, that the term vested in the overseers for the time being, and therefore that the plaintiffs were entitled to recover.

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provided; and that the said churchwardens and overseers, and their successors, the churchwardens and overseers of the poor of the said parish for the time being, from the said 1st day of *April* till the premises became out of repair, as hereinafter mentioned, held and enjoyed the said premises for and on behalf of the said parish, as such tenants as aforesaid. *Breach*, that the said churchwardens and overseers, for the time being, did not keep the premises in good and sufficient repair, according to the terms of the said demise, but that the premises were, and are, in bad repair and greatly dilapidated.

Pleas: first, that *Edward Sheppard* did not demise and let to *Charles Dalbiac* and others the said premises, in manner and form, &c.

Second, that *Charles Dalbiac* and others did not enter upon and become possessed of the premises, in manner and form, &c.

Third, that the said *Charles Dalbiac* and others did not promise, as in the declaration alleged.

Fourth, that the then churchwardens and overseers did not accept the premises, on behalf of the parish of *Hungerford*, for the residue and remainder of the term.

Fifth, that the said churchwardens and overseers of the poor of the parish of *Hungerford* and their successors did not, on behalf of the said parish, hold or enjoy the premises upon the terms in the declaration alleged.

Sixth, that the premises were not in a bad state of repair.

Issue was joined on these pleas.

At the trial, before *Patteson, J.*, at the *Wiltshire* Summer Assizes, a verdict was taken for the plaintiffs, for 100*l.*, subject to the opinion of the Court on the following case:—

Edward Sheppard being seised in fee of the house and premises in question in 1782, entered into a written agreement respecting them with *Charles Dalbiac* and others. This agreement was to the effect following:—

“Be it remembered, that it was agreed on the 25th day of *February*, in the year of our lord 1782, by and between *Edward Sheppard*, of the one part, and the before-mentioned committee, of the other part, as follows—first, the said *Edward Sheppard* doth hereby agree to demise and let unto the said committee, in trust for the inhabitants at large within the parish of *Hungerford*, in the counties of *Berks* and *Wilts*; and the said committee do hereby agree to accept and take of the said *Edward Sheppard* all that messuage or tenement, &c., called the *Three Tuns Inn*, in the parish of *Hungerford*, which said messuage and premises are intended to be converted into a poor-house for the use of the said parish of *Hungerford*; to hold unto the said committee, in trust as aforesaid, from the 25th day of *March* next coming, for and during the term of ninety-nine years, at and under the clear yearly rent of twenty-seven pounds, payable half-yearly, by equal portions; and the said committee do hereby agree to pay the said rent accordingly; and also to pay and discharge all assessments and taxes whatsoever, with all quit rents, &c., for or in respect of the said premises, and also to keep the premises in good and sufficient repair during the term; and the parties do agree that a lease and counterpart of the premises shall be prepared and executed on or before the first day of *January* next ensuing, with covenants and agreements pursuant to this present contract, and such other general clauses as are usually contained in leases. Provided, that in case the said committee or the major part of them, or their successors, shall think it more eligible to purchase in fee

the said messuage and premises for the use of the said parish of *Hungerford*, at the price of four hundred and twenty pounds, that then he the said *Edward Sheppard* shall accordingly convey the same premises, in such manner as the counsel or attorney of the said committee shall advise and require; the said *Edward Sheppard* defraying all the expenses of a fine and clearing the title up to himself, if need be; and the committee contributing a moiety of the costs and charges of the purchase deeds. And for the true performance of this agreement the said parties do hereby oblige themselves to the payment of the sum of five hundred pounds, of lawful money, to the other and others of them. Dated the day and year first before written."

(Signed), &c.

No lease was ever executed.

Edward Sheppard died in the year 1800, and the house and premises descended to his daughter *Margaret*, one of the plaintiffs, as his heiress at law. In 1801, *Margaret* was married to the other plaintiff, *Charles Alderman*.

The defendants were the churchwardens and overseers of the poor of the parish of *Hungerford* at the time the action was brought. Some of them had served those offices, but they were not all in office together during any part of the time when the parish was in possession of the premises, nor at the time when the guardians of the *Hungerford* Union took possession, as hereinafter mentioned, nor upon the 24th *June*, 1836.

The premises in question were, from the date of the above agreement, used as the poor-house of the parish of *Hungerford*. The churchwardens and overseers of the parish for the time being did all the repairs, and paid 27*l.* per annum for the rent of the premises, to *Edward Sheppard*, and to the plaintiffs from the 25th of *March*, 1782, until the 24th of *June*, 1835; and all rent which subsequently accrued due was paid by the officers or guardians of the *Hungerford* Union, who, by direction of the Poor Law Commissioners, took possession of the premises in question before the end of the year 1835.

On the 28th *September*, 1835, the plaintiffs served upon the overseers of *Hungerford*, a notice to quit the premises in question on or before the *Lady-day* following.

The plaintiff's title, and the dilapidated state of the premises, were admitted.

The question for the opinion of the Court was, whether under the above circumstances the plaintiffs were entitled to recover upon either, and which of the issues. If the Court should be of opinion that they were, then the verdict was to stand accordingly; if not, then a verdict was to be entered for the defendants, upon the several issues accordingly.

Erle, for the plaintiffs.—The instrument set out in the declaration operated as a lease for 99 years. The rent, the time of payment, and the commencement of the tenancy, are fixed; and the mere fact that a future lease is to be granted, with the usual covenants, does not make the instrument an agreement for a lease, *Doe, d. Pearson v. Ries* (a).—[*Alderson, B.*—In that case the terms were definitively settled.]—*Doe, d. Walker v. Groves* (b), *Tempest v. Rauling* (c), are in point.—[*Alderson, B.*, referred to *Morgan v.*

(a) 8 Bing. 178.
(b) 15 East, 244.

(c) 13 East, 18.

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Bissell (d).—*Poole v. Bentley (e)*, which is the leading case on this subject, is an authority in favour of the plaintiffs.

Secondly, if the Court should be of opinion, that this instrument is an agreement for a lease, and not an actual demise, still the plaintiffs are entitled to judgment on the first issue, as the question there raised is, whether *Sheppard* let the premises to be held on the terms stated in the instrument; not whether the term is unexpired or not.—[*Parke, B.*—The declaration states a demise for a term that is unexpired; that statement would not be supported if the present tenancy is from year to year, because there has been a notice to quit.]—An attempt will be made on the other side to question the decision in *Doe, d. Jackson v. Hiley (f)*, and it will be contended that this property does not belong to the parish under 59 *Geo. 3*, c. 12, s. 17. But if we look to the acts of the parties when this instrument came into operation, it will be plain that the premises in question belong to the churchwardens. [He referred to *Phillips v. Pearce (g)*, *Doe, d. Higgs v. Terry (h)*, *Doe, d. Hobbs v. Cockell (i)*, *Johnson v. The Churchwardens of St. Peter's, Hereford (j)*.]—[*Parke, B.*—Can the reversioner maintain an action against the assignee for not repairing under a parol agreement?—Lord *Abinger, C. B.*—It has been held, that a demise from year to year does not form a consideration for repairing the premises.—*Parke, B.*—Is there any authority to shew that a reversioner can take advantage of contracts which are not covenants?]
 —It may be doubted whether that question is open to the consideration of the Court. It might be discussed on a motion in arrest of judgment; but the present question is, in what manner the issues ought to be entered?

Barstow, contrd.—It is plain from the first and fourth pleas, that the main issue is, whether there was a demise for the term of 99 years. Now, it is by no means clear that the parties to this instrument contemplated the relation of landlord and tenant; for the agreement for the sale of the premises shews that they may have intended to become vendor and purchaser. *Morgan v. Bissell*, which is the leading case for the defendants, shews that the question, whether an instrument is to be lease, or only an agreement for a lease, depends on the intention of the parties, as it is to be gathered from the terms of the instrument. [He cited *Doe, d. Pearson v. Ries, Pearce v. Cheslyn (k)*, *Doe, d. Walker v. Groves (l)*.] Besides, the landlord himself has put a construction upon this agreement, by giving a notice to quit. But the most important question is, whether this lease passed to the overseers under 59 *Geo. 3*, c. 12, s. 17. That section enacts, that the churchwardens and overseers shall "accept, take and hold," certain lands and hereditaments, "belonging to such parish." The meaning of those words is not that they shall hold as the lessees of individuals, but that the property of the *parish* shall be conveyed to them in fee. It must be maintained, on the other side, that the words "accept, take, and hold," have the same meaning as the term "vest." But that is not the case, as the legislature has on many occasions, used the

(d) 3 Taunt. 65.

(e) 12 East, 168.

(f) 10 B. & Cr. 885.

(g) 5 B. & Cr. 433.

(h) 4 Ad. & Ell. 274; 1 Har. & Woll. 547.

(i) 4 Ad. & E. 478.

(j) 4 Ad. & E. 520; 1 Har. & Woll. 720.

(k) 4 Ad. & E. 225; 1 Har. & Woll. 768.

(l) 15 East, 244.

word "vest" in a different sense from that contended for. It is so used in *Gilbert's Act*, 22 *Geo.* 3, c. 81, s. 21; in 54 *Geo.* 3, c. 170, s. 8; in 55 *Geo.* 3, c. 137, s. 1; and in 5 & 6 *Will.* 4, c. 69, s. 8: and this construction of the defendants is reasonable, since otherwise the parish might be bound by a burdensome lease without having any power of discharging itself from it.

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Erle, in reply.—The mere fact of there being an option of purchasing does not prevent this instrument from operating as a demise.—[*Parke*, B.—Have you any case of a stipulation for "usual covenants," where the words "agree to demise," have been held to make no difference?—]No such case can be found; but *Barry v. Nugent*, cited in *Doe, v. Ashburner (m)*, approaches nearly to it.

Secondly, the defendants are not entitled to have the first issue found for them, on the ground that the term might be put an end to, and and was actually put an end to, by the notice to quit. The fair meaning of the plea is, that *Sheppard* did not demise.—[*Alderson*, B.—If you allege a demise for the term of 99 years, which is unexpired, and the defendants deny the demise, do they not put in issue the expiration of the term?—]If they had intended to do so they should have pleaded in a different manner.

Cur. adv. vult.

On a subsequent day the judgment of the Court was delivered by,

Lord ABINGER, C. B.—This was an action against the overseers for the time being of the parish of *Hungerford*, to recover damages for the non-repairing of certain premises; and the question turns on this point, whether the agreement which is the foundation of the action, is to be construed as a demise, or only as a contract for a lease. It appears that originally the premises in question were let to trustees, to the use of the poor of the parish of *Hungerford*, under an agreement dated the 25th of *February*, 1782, by which they were to have possession of the premises for 99 years, to commence from the *Lady-day* next ensuing, at a yearly rent of 27*l.*, payable half-yearly, with the provisoes, that before the 1st *January* then next ensuing, a lease should be executed, containing the usual covenants; and that in case the parties accepting the premises, or their successors, should think it expedient to purchase the fee simple in the soil for a certain price, the lessor would make a conveyance to them accordingly. The defendants' counsel contended that this agreement could not operate as an absolute demise for 99 years; and he urged in support of this proposition the circumstance of its containing a stipulation for the execution of a lease at a future period. But so many cases are to be found where agreements have been held to operate as actual demises, notwithstanding the insertion of a stipulation similar to the above, that this argument cannot be sustained. It is then suggested that it might have been optional on the part of the defendants to treat the instrument as a lease or not; but we think, on the view of the whole instrument, that it is a question for our decision, whether or not the instrument contains words sufficient to amount to a present demise, if it can be collected, from the circumstance of the case, that it was the intention of the parties that it should do so.

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Here then, the parties agree that the term in question is to commence from the 25th of *March*, 1782, at a certain yearly rent. On this the question arises, when would the first year's rent become due. No one can suppose for a moment that it would become due at any other period than at the *Michaelmas* following, in which case the term must have commenced immediately on the date of the agreement; and if so, what was the term in question but the one for 99 years, mentioned in the agreement? If, however, the first payment of rent be not considered as accruing due at *Michaelmas*, 1782, it must necessarily be so at the *Lady-day* next following, and on that construction we are to suppose that, although the lessor created a tenancy for 99 years from *March*, 1782, at a half-yearly rent, still that no rent was to be payable till the expiration of a full year from that date; and consequently, the last half-year's rent would become due at the end of the half-year after the term had expired. It is more proper that the rent should be payable within the term, than after its expiration; as in the latter event the landlord's remedy is gone. We think it would have been better if the Courts had not given so wide a construction to instruments of this nature; but on consideration of all the cases taken together, we cannot avoid the conclusion, that stipulations for the execution of leases *in futuro*, do not necessarily contradict the notion of an instrument of this description amounting to a present demise. Besides, the agreement in this case, containing the covenants usually found in actual leases, goes far to prevent the doubt and uncertainty which such an agreement might otherwise create; and the specific agreement for repair and payment of rent, amounts to a promise that the lease shall be put an end to, if the rent is not paid and the repairs not performed. For all which reasons we think, that the lease in this case took effect from the date of the agreement. The next question in the case is, whether, supposing this to be a lease, the property vested in the overseers of the poor, under the 59 *Geo. 3*, c. 12, s. 17. This point has been ingeniously argued before us, but we do not consider the question as *res integra*, since it was decided by the Court of *Queen's Bench* that the Statute does apply in all cases; and as here the agreement is a grant of property to be used for a poor-house, we think that it is within the province of the Statute, and accordingly the property is vested in the overseers for the time being. Our judgment, therefore, must be for the plaintiffs.

Postea to the plaintiffs.

HITCHMAN v. WALTON.

The tenant of leasehold premises, assigned them by way of mortgage, and afterwards became bankrupt. The lease contained a covenant to yield up all fixtures to the messuage belonging or to belong:—*Held*, that the fixtures did not pass to the assignees as goods and chattels, in the possession, order, and disposition of the bankrupt; and that the mortgagee might maintain an action in case as reversioner, against the assignees for removing them.

CASE. The first count stated that certain messuages and premises at *Hampstead* were in the possession and occupation of one *James Pett*, as tenant thereof (the reversion thereof then belonging to the plaintiff), and that the defendant pulled down, removed, and destroyed certain fixtures on the said premises, and in so doing dilapidated, injured, and destroyed the said

messuage belonging or to belong:—*Held*, that the fixtures did not pass to the assignees as goods and chattels, in the possession, order, and disposition of the bankrupt; and that the mortgagee might maintain an action in case as reversioner, against the assignees for removing them.

messuage and premises, and afterwards converted and disposed of the fixtures to his own use. The second count was in *trover* for the fixtures.

The defendant pleaded, *first*, Not guilty; *secondly*, to the first count, that the premises in the first count mentioned were not in the occupation of the said *James Pett*, as tenant thereof to the plaintiff, *modo et formâ*. *Thirdly* to the second count, that the plaintiff was not possessed as of his own property of the said effects, *modo et formâ*. Upon these pleas issues were joined.

At the trial, before *Gurney, B.*, at the *Middlesex* Sittings after last *Trinity Term*, it appeared that by a lease, dated the 5th *July*, 1831, one *Masters* demised the premises in question to *Pett*, for the term of twenty-one years. The lease contained a covenant by *Pett* to "surrender and yield up the said messuage or tenement and premises at the end of the said term thereby granted, in a good state of repair and condition, together with all partitions, doors, windows, casements, bells, bars, hinges, locks, keys, shelves, dressers, pumps, pipes, cisterns, and all other fixtures and things to the said messuage or tenement, or any part thereof, belonging or to belong (reasonable use and wear thereof in the mean time only excepted). Under this lease *Pett* entered and occupied the premises, and carried on business in them. In *September*, 1832, the plaintiff lent *Pett* 300*l.*, and as a security took an assignment of the lease by way of mortgage. *Pett* continued in possession of the premises until *November*, 1837, when he became a bankrupt. The defendant was chosen assignee, and by his orders the tenant's fixtures, which had been put up previously to the mortgage, were taken down and sold in *February*, 1838. It was submitted, on the part of the defendant, that the plaintiff must be nonsuited; first, because the tenancy was not of a nature to which a reversion was incident; and secondly, because *trover* would not lie for fixtures. The learned judge refused to nonsuit the plaintiff, and a verdict was found for him for 63*l.* in respect of the fixtures, and 3*l.* for dilapidations; with liberty for the defendant to move to enter a nonsuit.

A rule having been obtained accordingly,

Humfrey and *White* shewed cause.—Most of the fixtures in question were on the premises at the time the lease was granted to *Pett*, and all of them were there at the time of the mortgage. Upon the execution of the mortgage deed, the plaintiff took all the estate, right, title, and interest of *Pett*, and *Pett* became tenant to the plaintiff, *Partridge v. Bere* (a). By the covenant in the lease, *Pett* was to deliver up to his landlord "all fixtures to the premises belonging or to belong." Now, independently of the words of the covenant, these fixtures, being on the premises at the time of the mortgage, would pass to the mortgagee, *Steward v. Lombe* (b), *Colegrave v. Dias Santos* (c), *Hare v. Horton* (d), *Longstaff v. Meagoe* (e). Then, as to the second point, it has been decided that *trover* will lie for fixtures, when severed; and under such circumstances as the present they are not within the order and disposition of the bankrupt, so as to pass to his assignees, *Boydell v. M^r Michael* (f).

Platt, in support of the rule.—The tenancy was not of that nature to which a reversion is incident. The term "reversion" has a well defined legal mean-

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(a) 5 B. & A. 604.

(b) 4 Moore, 281; 1 B. & B. 506.

(c) 2 B. & C. 76.

(d) 5 B. & Adol. 715.

(e) 2 A. & E. 167.

(f) 1 C., M. & R. 177; 3 Tyr. 974.

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ing ; it is the residue of an estate left in the grantor, to commence in possession after some particular estate *granted out of him*. Here *Pett* was a mere tenant at will, and the plaintiff might have maintained an ejectment against him, upon default of payment of the principal and interest in *September, 1833*. *Wilkinson v. Hall (g)*, is distinguishable ; there the plaintiff mortgaged land in fee, with a proviso for redemption on payment of the principal and interest on a certain day ; and it was agreed that the mortgagee should not be entitled to call in the principal for seven years, provided the interest were regularly paid in the mean time. And it was further agreed, that the mortgagor should occupy and enjoy the premises until default in payment of the principal and interest ; and the Court held, that though by the first part of the deed the fee was vested in the mortgagee, the subsequent part operated as a re-demise of the premises to the mortgagor, provided the interest were regularly paid. Here the time appointed for the payment of principal and interest had expired. Then, as to the count in *trover* : *Pett* was bound to leave upon the premises all the fixtures to the said premises belonging or to belong. By this express stipulation, the landlord would be entitled to them. The second count cannot be supported, as they never were the fixtures of the mortgagee.

Lord ABINGER, C. B.—The rule must be discharged. The second plea denies that the premises were in the occupation of *Pett*, as tenant to the plaintiff ; now, if the mortgagor is not tenant to the mortgagee, in what situation does he stand ? He is not a trespasser ; the very terms of the mortgage deed prevent that conclusion. He is not a servant, for the mortgagee is not in possession. Then in what relation does he stand ? To ascertain that we must look to the terms of the mortgage deed. By that deed an absolute interest is vested in the mortgagee for a certain time, and if the mortgagor pays the principal and interest at the appointed time, then the property reverts in the mortgagor. If default be made, and the mortgagor is still allowed to remain in possession, then he holds over on the same terms as before, and continues in his character of tenant. Then, in what way is the mortgagee to declare ? I do not see how the mortgagee could declare, unless by alleging that he was the owner of the reversion, or by stating the special circumstances, and that he was the owner of the fee. But then, it is asked, what estate can the mortgagee have ? He has the estate created out of the mortgage, and remains in possession as tenant at will until the mortgagee determines that estate, by taking possession himself, or granting a lease to another person, which would be a determination of it. It is true that an ejectment might have been maintained against the mortgagor, but that would proceed upon the ground that he has admitted the tenancy and ouster. It appears to me, therefore, that the issue upon the tenancy was properly found against the defendant. Then as to the count in *trover* ; the plea is, that the plaintiff was not possessed of these fixtures as of his own property. It is true that the fixtures, by the terms of the lease, belong to the original landlord ; but he could have no right to possess them until the term had expired, and during the continuance of the term the tenant might maintain an action, if they were taken away. Here the mortgagee stands in his place, and is entitled to recover damages for their

removal or injury. It appears to me, that in whatever view the case is considered, the plaintiff has a right to recover the value of these fixtures. Under these circumstances the fixtures do not pass to the assignees as goods and chattels in the possession, order, or disposition of the bankrupt. The plaintiff is entitled to retain his verdict for the whole amount.

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PARKE, B.—I am of the same opinion. The first count is for an injury to certain premises in the occupation of *Pett*, as tenant to the plaintiff (the reversion thereof then belonging to the plaintiff). The first plea is Not guilty, and there is no doubt the plaintiff is entitled to a verdict upon that issue. The next plea is, that the premises were not in the occupation of *Pett*, as tenant to the plaintiff. The question then is, whether the mortgagee may not treat a mortgagor in possession as his tenant; *Partridge v. Bere* has decided that he may, and I concur in the propriety of that decision. He is not bound so to treat him; but he may, if he think fit, maintain an ejectment against him, which, if he were a tenant for all purposes, he could not have done. This is sufficient, therefore, to entitle the plaintiff to maintain his verdict upon the first count. Then the second count is in *trover* for these fixtures in their severed state. The rule was granted upon the supposition that the fixtures had been placed upon the premises *after* the mortgage, but that does not appear to have been the case. There is no doubt that if a tenant places fixtures upon the premises, and then transfers them by way of mortgage, that the fixtures pass to the mortgagee; *Colegrave v. Dias Santos*, *Longstaff v. Meagoe*. Then, it is contended, that inasmuch as *Pett* was bound to give up *all* the fixtures at the end of the term, which I am inclined to think he was, (though perhaps contrary to the intention of the parties), that even any fixtures put up after the mortgage, would have passed to the mortgagee. That point, however, does not arise. Mr. *Platt* contended that the effect of the lease was to give the plaintiff only a special interest in the fixtures, and not the absolute power of removal. But *Boydell v. M^r Michael* shews that the tenant has such an interest in the fixtures as to enable him to maintain *trover* for them if removed. I think, therefore, that the plaintiff may maintain *trover*, and that the measure of damage is the value of the fixtures.

GURNEY, B., concurred.

Rule discharged.

CHANTER v. HOPKINS.

ASSUMPSIT. The declaration stated, that the defendant was indebted to the plaintiff in the sum of 15*l.* 15*s.*, for the licence, consent, and permission of the plaintiff before then granted by him to the defendant at his request, to erect, set up, and use, at and upon certain premises of the defendant, a certain patent invention, whereof the plaintiff was then the owner

The defendant wrote to the plaintiff as follows:—"Send me your patent hopper and apparatus to fit up my brewing copper with

your smoke-consuming furnace." The patent furnace was accordingly sent and erected, but was found to be useless in a brewery:—*Held*, that the contract was satisfied by erecting the furnace; and that there was no implied warranty that it should be suitable for a brewery.

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and proprietor, called *Chanter's* Smoke-consuming Furnace, and to use and apply the same for the use and benefit of the defendant; which patent invention of the plaintiff the defendant had then erected, used, set up, and applied to his own use and benefit, under and by virtue of the said licence and permission. There were also counts for goods sold, and for work and labour, *Plea, non-assumpsit.*

At the trial, before *Gurney, B.*, at the *London* Sittings after last *Easter Term*, it appeared that the plaintiff was the proprietor of a patent for the invention of a furnace and stove, having an apparatus for the purpose of consuming its own smoke. The defendant a brewer, at *St. Ives, Huntingdonshire*, applied to him for one of his patent furnaces, by the following written order:

“*St. Ives*, 16th of *September*, 1835.

“Send me your patent hopper and apparatus, to fit up my brewing copper with your smoke consuming furnace. Patent right 15*l.* 15*s.*; iron work not to exceed 5*l.* 5*s.*; engineer's time, fixing, 7*s.* 6*d.* per day.

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The furnace and apparatus were accordingly sent in the *November* following, and put up upon the defendant's premises under the superintendence of a workman of the plaintiff. On the plaintiff's applying for payment, the following letter was written to him by the defendant's attorney.

“Sir,

St. Ives, 28th *December*, 1835.

“By your contract with *Mr. Hopkins*, you were to do the work to his furnace in such a way, that there was to be a great saving of coals; that there was to be no more smoke than from a common chimney; that considerable time was to be saved in the work of the brewery, and that there was to be less labour at the furnace. Instead of these advantages, the new furnace consumes quite as many coals as the old one; there is quite as much smoke; there are several hours more time consumed in brewing, and there is a vast deal more labour at the furnace, and the copper is very much injured. Under these circumstances, we are directed by *Mr. Hopkins* to apply to you for compensation, and unless the same be made, and the old furnace restored, within seven days from this day, an action will be brought against you for the injury sustained.”

The firm of which the plaintiff was a member, replied as follows.

“Gentlemen,

London, 30th *December*, 1835.

“We are not a little surprised at the terms of your letter received yesterday, in *Mr. Chanter's* absence. On examining our man, we find the furnace he erected worked extremely well when he was there; but he says the fireman has a determined opposition to it, and if such be the case, the very best of inventions cannot be made to answer. We have no difficulty of sending fifty witnesses into Court to prove all we ever engaged with *Mr. Hopkins*; we, therefore distinctly inform you, we shall enforce the payment of our demand on *Mr. Hopkins*, and if *Mr. Hopkins* refuses payment, we presume you will wish the document sent you. You will oblige us to say *Mr. Hopkins's* determination; ours you have without alteration.”

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The defendant subsequently sent back the furnace to the plaintiff's premises in *London*. The plaintiff proved that his patent furnace was in much use, and was an article well known in the market; and called several witnesses, of different trades, who stated that they had used the apparatus to much advantage, and that it consumed a great portion of its smoke. On the other hand, the defendant proved that it had not been of any service on his premises; and he offered evidence of conversations with the plaintiff before the order was given, for the purpose of shewing that the plaintiff knew the apparatus was to be used in a brewery, for which it was alleged that it was not suitable. No fraud, however, was imputed to the plaintiff. This evidence was objected to; but the learned judge received it, subject to the opinion of the Court as to its admissibility. It was contended for the defendant, that under the circumstances, there was an implied warranty on the part of the plaintiff, that a smoke-consuming furnace should be furnished to the defendant, which should be useful *in a brewery*. The learned judge reserved leave to the defendant to enter a verdict for him, if the Court should be of that opinion; and, under his direction, a verdict was found for the plaintiff; damages, 15*l.* 15*s.*, the jury stating also, in answer to a question from the learned judge, that in their opinion the patent furnace was useless to the defendant as a brewer.

Byles, in support of the rule.—It is clear from the correspondence and the conversations with the plaintiff, that he was aware that his apparatus was to be used in a brewery; and if they be taken in connection with the order, there is an implied warranty that a furnace should be erected which should consume smoke in a *brewery*. But the jury have found, that the article sent was totally useless in a brewery; and there is no attempt to say that it was used beyond the time necessary for a fair trial.—[*Parke*, B.—You cannot add any parol statement to the order for the purpose of making a warranty; as you do not impute fraud, the whole turns upon the construction of a written order.]—The written order contains the words “to fit up my brewing copper with your smoke-consuming furnace.” That implies a warranty on the part of the plaintiff, that the article sent shall be a smoke consuming furnace, fit for a brewery. *Jones v. Bright* (a), is an authority in favour of the defendant. There the plaintiff purchased of the defendant, some copper sheathing for a ship, and the defendant, who knew the purpose for which it was wanted said “I will supply you well:” it was held that this was an implied warranty that the copper was fit for that purpose. *Best*, C. J., says, “In a contract of this kind, it is not necessary that the seller should say, “I warrant;” it is enough if he says the article which he sells is fit for a particular purpose. If he sells it for a particular purpose he thereby warrants it fit for that purpose.” The same opinion is expressed by *Abbott*, C. J., in *Gray v. Cox* (b), though that case was ultimately decided upon a different ground. These authorities are established by *Street v. Blay* (c), in which it is laid down, that the purchaser, may not only insist upon a breach of warranty, but if he have no opportunity of ascertaining the quality of the chattel before he orders it, he may, if it does not answer the warranty, rescind the

(a) 5 Bing. 583; 3 M. & P. 155.

(c) 2 B. & Adol. 456.

(b) 1 C. & P. 184; 4 B. & C. 108
 6 D. & R. 200.

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contract and return the chattel, after having kept it a reasonable time for the purpose of trial. Lord *Tenterden* says, "It is to be observed, that although the vendee of a specific chattel, delivered with a warranty, may not have a right to return it, the same reason does not apply to cases of executory contracts, where for instance, an article is ordered from a manufacturer, who contracts that it shall be of a certain quality, or fit for a certain purpose, and the article sent is such as is never completely accepted by the party ordering it. In this, and in similar cases, the party may return it as soon as he discovers the defect, provided he has done nothing more in the mean time than was necessary to give it a fair trial." This was not the case of a specific chattel set out and appropriated for the defendant, but the plaintiff was to manufacture a furnace which would consume smoke, and be fit to be used in a brewery.—[*Parke*, B.—All that the defendant orders is a smoke-consuming furnace, according to the plaintiff's patent, to be used in a brewery. The difference between this case and that of *Jones v. Bright* is, that here the subject of the contract is defined by the buyer: the object for which he wanted it is immaterial.]—Suppose the buyer had said, send me one of your horses to draw my carriage; would there not have been an implied warranty that the horse was fit for that purpose?—[*Parke*, B.—That is not the present case, it is as if the buyer had said, "send me that bay horse in the third stall of your stable, to draw my carriage;" then the contract would be satisfied by sending the horse.

Byles then contended that the evidence was admissible in reduction of damages.

Lord ABINGER, C. B.—I am of opinion that the rule must be discharged. A great confusion has arisen in many of the cases, from the unfortunate use of the word "warranty," in delivering judgment, and in consequence two things have been confounded together. A warranty is an express statement of something or other which the party undertakes shall be part of the contract and is generally collateral to the express object of it. But in many of the cases referred to, the circumstance of a party selling a particular thing by description, has been called an implied warranty; but it would have been much better to consider such cases as a non-compliance with a contract, which a party has engaged to fulfil; as if a man offers to buy beans of another, and the latter should send him peas, he does not perform his contract; but that is no warranty. So, if a man orders copper for sheathing ships, that is a particular copper, prepared in a particular manner; if the seller should send him a different sort, he does not comply with the contract, and though from a loose mode of expression the word "warranty" may have been introduced, yet it is not done so properly. Now the question in this case is, whether or not the order has been complied with in its terms. The order was for one of those engines, of which the plaintiff was known to be the patentee, without regard to the object to which the defendant meant to apply it, and it is admitted that there is no fraud. If, when the plaintiff received such an order he had known that it could not be so applied, and had found that the defendant was under some misapprehension on the subject, and that he was buying a thing on the supposition that it could be applied to that use, there might be ground for avoiding the contract on account of the concealment of a particular fact. Or if the terms of the contract had been, "I will send you one

of my smoke-consuming furnaces, which shall suit your brewery," that would have been a warranty. But in this case no fraud whatever is suggested; it is the case of an order by a purchaser of a specific chattel, believing that it will answer a particular purpose, to which he means to apply it; and it turns out that it will not. I see, therefore, no ground for disturbing the verdict.

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PARKE, B.—I am also of opinion, that there is no ground for disturbing the verdict. The rule of law is clear, that a written contract cannot be varied by any thing which occurred by parol between the parties. If indeed there had been any misrepresentation on the part of the plaintiff, then the buyer might relieve himself upon the ground of fraud. But here, no imputation of fraud is made; we must therefore look to the order itself and put a construction upon the terms found in it. The order is, "Send me your patent hopper and apparatus, to fit up my brewing copper with your smoke-consuming furnace." Here the order defines the thing which is wanted, and it is immaterial whether it answers the purpose for which it is wanted or not. But in *Jones v. Bright* the order was for an undefined thing, stated to be for a particular purpose; and unless it answered such purpose, the manufacturer could not seek for the price. The case may be illustrated by the examples already referred to. Under this contract, it seems to me, that all the plaintiff has to do is to send his patent apparatus, and he will be entitled to recover, whether it answers the purpose of the defendant or not. As he has furnished the machine contracted for, he is entitled on this contract to recover the stipulated price, namely, fifteen guineas. On these grounds, it appears to me that the verdict was right, and that the damages cannot be reduced.

GUERNEY, B.—I am of the same opinion.

Rule discharged.

ONLEY v. GARDINER and another.

TRESPASS for breaking and entering two closes of the plaintiff, called the *Click-head Meadow*, and the *Rock-hill Cotts*. The defendants pleaded, under the 2 & 3 Will. 4, c. 71, s. 2, a right of way over the closes in question, to and from a close in their occupation, called the *Click-head Coppice*, claiming it by enjoyment for twenty years next before the commencement of the suit. The replication traversed the right of way, upon which issue was joined. At the trial, before *Patteson, J.*, at the last *Worcester Assizes*, it appeared that about forty years ago, the close, called the *Click-head Coppice*, was a hop-yard; and that at that time hops used to be carried from thence over the plaintiff's closes to the highway; and also, that once in every six or seven years, hop-poles were carried from thence over the plaintiff's closes to the highway. The hop-yard was afterwards planted as a coppice, and for many years, until about fifteen years before the commencement of the suit, all the three closes had been occupied together. From that period

In order to entitle a defendant to the benefit of the plea given by 2 & 3 Will. 4, c. 71, s. 2, he must prove an enjoyment of the easement as such, and as of right, for a continuous period of twenty years next before the suit. Proof of unity of possession may be given in evidence under a traverse of the plea.

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to the commencement of the action the defendants proved a user of the way for all purposes. It was objected, on the part of the plaintiff, that as there was a unity of possession, the defendants had not proved their plea, of an enjoyment, *as of right*, for the period of twenty years next before the commencement of the suit. A verdict was found for the defendants, with liberty to move to enter a verdict for the plaintiff, with nominal damages.

Talfourd, Serjt., having obtained a rule accordingly,

Mawle and *R. V. Richards* shewed cause.—The defendants have proved an enjoyment as of right for twenty years within the meaning of the Statute. It is evident, from the definition in the 4th section, of what shall be deemed an *interruption*, that the Statute does not require a *continuous* enjoyment during the whole period of twenty years.—[*Parke*, B.—Interruption, means an obstruction by the owner of the *locus in quo*; and that is to be of no avail unless acquiesced in for a year.]—The Statute only requires an actual enjoyment for twenty years, uninterrupted by a year's acquiescence in an obstruction. That construction of the Statute is supported by the 8th section, which provides for the suspension of the right during the term of forty years, in case of an outstanding term for life or years. The words, "next before," &c., do not apply to any suspension of the right; but if the twenty years extend to the period of the commencement of the suit, that satisfies the Statute. Thus, the twenty years may consist of four periods, of five years at intervals, broken by unity of possession, provided the last period of five years extended to the time of the commencement of the suit. In *Tickle v. Brown* (a), an enjoyment *as of right* is defined to be "an enjoyment had not secretly or by stealth, or by tacit sufferance, or by permission asked from time to time, but openly and notoriously, by a person claiming to use it without danger of being treated as a trespasser.

Secondly, the 5th section requires that all matters of fact or law, not inconsistent with the simple fact of enjoyment, shall be specially alleged and set forth in answer to the party claiming. The plaintiff should then have replied the fact of unity of possession.—[*Parke*, B.—Suppose the case of a tenant for forty years under a lease.]—In that case he should specially reply that he had a lease.—[*Parke*, B.—He could not do so; in order to defeat the right, it must appear that it was enjoyed under a consent or agreement in writing, expressly given for *that purpose*.]—A grant of way must be replied, and there seems no valid reason why a lease should not.—[*Parke*, B.—The lease does not give the *right of way*; it is a grant of the soil, not of an easement over it.]—It is submitted, that the meaning of the 5th section is, that where an alleged right has been *de facto* exercised for twenty years, the party seeking to qualify that right must shew by his replication the special circumstances. It must be admitted, that the opinion expressed by the Court in *Bright v. Walker* (b), is against the present argument; but it is submitted that it is not borne out by a strict consideration of the Statute.

PARKE, B.—We shall probably not trouble the counsel on the other side; in the mean time the Court will consider the case.

Curr. adv. vult.

The judgment of the Court was delivered a few days afterwards, by

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PARKE, B.—The plea of actual enjoyment, as of right, of a way over the *locus in quo* for twenty years next before the commencement of the suit, cannot be supported. We are clearly of opinion, that in order to entitle the defendants to the benefit of the Statutory plea, it must be an enjoyment of the easement *as such*, and as of right, for a *continuous period of twenty years next before the suit*, without such interruption as is defined in the Act; upon which nothing turns in this case. This appears to us to be the natural construction of the 4th section of the Statute 2 & 3 Will. 4, c. 71, by which construction we ought to abide, unless it could be made out that it would lead to some absurdity, or manifest incongruity with the intention of the legislature, to be collected from every part of the Statute. No such absurdity or inconsistency would follow from this construction; on the contrary, to hold that the words might be satisfied by an enjoyment for different intervals, which added together would be twenty years, the last continuing up to the commencement of the suit, would be to let in a great number of cases in which the presumption of a grant never could have existed before the Statute. For instance, if the occupier had used the road openly for a year or two, and then uniformly have asked permission on each occasion, or only used it secretly and by stealth for some years, and then resumed the enjoyment of it, no one would contend that a grant could have been presumed, because the intervals of enjoyment united might amount to twenty years. A similar reason applies to intervals of unity of possession, during which there is no one who could complain of the user of the road. It would be no answer to say, that in one particular case, where the land, over which the right is exercised, is out on lease, the legislature had provided for the noncontinuity, if I may so say, of one of the periods mentioned in the Act; but in truth it has not so provided, for the effect of the 8th section is not to unite discontinuous periods of enjoyment, but to extend the period of continuous enjoyment, which is necessary to give a right, by so long a time as the land is out on lease, subject to the condition therein mentioned.

It appears to us, therefore, that according to the words and meaning of the Act, the enjoyment of the easement must be continuous; and the Court has already intimated its opinion to that effect, in the case of *Monmouthshire Canal Company v. Harford* (c).

That an enjoyment must be of an easement *as such*, is a matter on which we feel no difficulty; and the Court has already put this construction on the Act, after some consideration, in the case of *Bright v. Walker* (d), though the precise point was certainly not in judgment. As to the question, whether the proof of unity of possession is admissible under the traverse of the plea, no doubt can be entertained since the decision of the case of *Monmouthshire Canal Company v. Harford*, and its confirmation by the Court of *King's Bench* in *Tickle v. Brown* (e); and by the Court of *Common Pleas*, in *Beasley v. Clarke* (f). The "simple fact of enjoyment," referred to in the 5th section, is an enjoyment *as of right*, and proof that there was an occa-

(c) 1 C., M. & B. 631; 5 Tyr. 85
(d) *Ibid.* 211; Tyr. 502.

(e) 4 Ad. & Ell. 382
(f) 2 Bing. N. C. 708; 3 Scott, 256.

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sional unity of possession, is as much in denial of that allegation as the occasional asking permission would be.

We think, however, that under these circumstances, the defendant should have leave to amend, by pleading the right immemorially.

Rule accordingly.

Talfourd, Serjt, and *W. J. Alexander* appeared to argue in support of the rule.

SMITH and others, Survivors of SAMUEL SMITH, and GEORGE SMITH, deceased, v. WINTER.

The plaintiffs, who held certain promissory notes as a collateral security, gave by deed further time to the principal debtor, without the consent of the surety; the surety afterwards, and before the notes became due, consented to such giving of time: *Held*, that the liability of the surety was revived.

Quære, whether such a deed, executed by one partner only, "for self and partners," can bind the firm, there being no proof of a consent by the others to that mode of execution.

ASSUMPSIT by indorseees against makers of three promissory notes. The first note was for 2,000*l.*, dated 30th of *April*, 1831, and payable six months after date; the second was for 3,000*l.*, of the same date and time of payment; the third was for 2,000*l.*, dated 6th *July*, 1831, payable three months after date. There were also the usual money counts.

The ninth plea, which was alone material, was as follows:—"And for a further plea the defendant says, that she made the notes in the first three counts mentioned at the request and for the accommodation of one *John Innes*, without any value or consideration for paying the amounts thereof, and that there never was any value for the indorsement in those counts mentioned, of all which the plaintiffs had notice at the time of the indorsement to them; and that before and at the time of forbearing and giving day of payment, as thereafter mentioned, the plaintiffs held the said notes as securities for the payment of money by *Innes*, as principal debtor to them, and that defendant then was liable (if at all liable) to the plaintiffs upon the said notes only collaterally, and as a surety for *Innes*, and not otherwise, of which the plaintiffs at the time of forbearing and giving day of payment, had notice; and that after the notes were indorsed to the plaintiffs, and before the same or any of them had become due and payable, and before the commencement of the suit, to wit, &c., the plaintiffs, without the knowledge, privity, consent, or authority of the defendant, forbore and gave day of payment to *Innes* for a long space of time, to wit, for a space of time which did not expire until twelve months and upwards after the said notes became due and payable, of a large sum of money, to wit, 17,000*l.*, then owing from *Innes* to them, and as collateral securities only, and not otherwise, for the payment of parts whereof, by the said *Innes*, they, the said plaintiffs, then, to wit, &c., held the said notes."

Replication, that the plaintiffs did not, without the knowledge, privity, consent, or authority of the defendant, forbear and give day of payment to the said *John Innes*, in manner and form, &c.

At the trial, before Lord *Abinger*, C. B., in *London*, at the Sittings after last *Trinity Term*, the following facts appeared:—The plaintiffs were bankers, composing the firm of *Smith, Payne, & Smith*, and the defendant was the widow of *Nathaniel Winter*, who, in his lifetime and up to the month of *May*, 1830, carried on business with Mr. *John Innes*, as *West India* merchants, under

the firm of "*Nathaniel Winter & Co.*;" and from the 1st of *May*, 1830, to the 16th of *May*, 1831, with a *Mr. Robert Cumming Norman*, under the same firm. A dissolution of partnership between *Mr. Innes* and *Mr. Norman* took place on that day. The plaintiffs were the bankers of *Mr. Innes*, and upon the 8th of *July*, 1831, he being in want of money, applied to them to discount one of the notes for 2,000*l.*, mentioned in the declaration, which they accordingly did. On the 22d of *July*, 1831, a further application was made to them by *Innes* for an advance of money, upon the deposit of the other two notes as security, which was also made. Before any of the notes became due, *Mr. Innes* suspended his payments, and on the 1st of *September*, 1831, his affairs were placed in the hands of inspectors, and a deed of inspectorship, between himself and several creditors, was drawn up and executed on that day. The parties to the deed were *Innes*, of the first part; certain creditors of *Innes*, and amongst them the plaintiffs (specified in the schedules), of the second part; *Robert Cumming Norman*, of the third part; and *George Ward Norman*, *Martin Tucker Smith*, and *James Parkinson*, of the fourth part; and after reciting that *Robert Cumming Norman* had retired from the partnership, and that *Innes*, as between him and *Norman*, was bound to pay all the debts of the co-partnership (and other recitals); it was agreed by the deed, that, notwithstanding the debts due from *Innes* to his creditors, it should be lawful for him to continue to manage and carry on the business of a *West India* merchant, and to receive and sell the produce of his estates, and of such other estates as might be consigned to him, and make such disbursements as should be necessary, &c.; and that the several creditors, parties thereto, should not, nor would call for, or compel payments due to them respectively, within the period of three years next following the date thereof. It was further provided, that *Innes* should keep true accounts, and submit them to the inspection of the parties to the deed of the fourth part. It then provided for the payment of debts, as money came to the hands of *Innes*. It then contained this clause: "And it is hereby declared, that persons holding bills, bonds, notes, or other securities of the said *John Innes*, or any other person, should not be prejudiced or affected in respect of their recourse against third parties, or against the property pledged by reason of their concurring in this licence and agreement." It also contained a proviso, that the deed should be void, as far as it restrained the creditors from suing, if *Innes* should make default in the stipulations and agreements on his part, or if the creditors in *England* should not sign the deed within three months, and those abroad within eighteen months from the date thereof. The deed was executed upon the 12th of *September*, 1831, as regarded the plaintiffs, by *Samuel George Smith* only (one of the plaintiffs), in the following manner: "For self and partners, *Samuel George Smith*." It appeared that it had been signed at the banking house, but there was no evidence of assent or dissent by the other partners to this mode of signature. Upon the 23d of *September*, 1831, before any of the notes became due, the following consent was given by the defendant:

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"I consent to the several creditors of *Mr. John Innes*, or *Nathaniel Winter & Co.* signing the deed of inspectorship already prepared, dated, &c., and giving time to *Mr. Innes*, without prejudice to their claims on me, or on the

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estate of the late *Nathaniel Winter*, in respect of any debts to which I, or Mr. *Winter's* estate may be liable.

(signed) "*Elizabeth Winter.*"

Some of the creditors having failed to execute the deed within the time required, the plaintiffs and other creditors, at the request of Mr. *Innes*, signed a memorandum upon it to continue its operation, notwithstanding the above circumstances. Previous to the signature of this memorandum by the plaintiffs, the defendant gave this further consent, dated the 8th of *December*, 1831 :

"As the deed, above referred to, contained a clause rendering it void if all the creditors in *Great Britain* did not sign within three months, and those resident abroad within eighteen months, which clause it has been found necessary to waive by a memorandum, signed by the creditors, and indorsed on the deed, I declare that the consent I have already given to the creditors signing the inspectorship deed, shall be considered applicable to the deed so altered.

(signed) "*Elizabeth Winter.*"

The two bills at six months became due on the 2d of *November*, 1831, and that at three months on the 9th of *October*, 1831. It appeared, that in *August*, 1831, the plaintiffs had received from *Innes* 1,000*l.*, on account of the bills. This action was brought to recover a balance of 4,500*l.* due upon the bills, with interest. Upon the production of the deed of inspectorship, and the reading of the clause by which the parties undertook not to compel payment from *Innes* for three years, the defendant contended that the plea was proved. The plaintiffs contended, first, that as the deed was signed by one of the plaintiffs only, no consent of the others being shewn, the firm were not bound by his signature. Secondly, they relied upon the proviso in the deed, that it was not to affect the holders of bills or securities as to their recourse against third parties ; and thirdly, upon the consent by the defendant to the plaintiffs' execution of the deed, by which her liabilities were revived. It was further contended by the defendant, that as the two notes of the 30th *April*, 1831, were indorsed by *Innes* in the name of the firm, "*Nathaniel Winter & Co.*," it was necessary for the plaintiffs to prove that those indorsements were made before the dissolution of partnership with *Norman*, upon the 16th of *May*, 1831. The latter point was put to the jury, who, being also directed by his lordship to find in the terms of the issue upon the ninth plea, they found a verdict for the plaintiffs for the sum of 6,191*l.* 5*s.* 10*d.*, the amount claimed ; and also that there was no evidence that the notes were indorsed before the 16th of *May*, 1831, but that *Innes* had authority from *Norman* generally to wind up the partnership concerns, and do all that was necessary for that purpose with regard to any bills, notes, or securities. They found upon the issue on the ninth plea, that the plaintiffs did, without the privity, consent, or knowledge of the defendant, give time of forbearance : *Innes*, but that the defendant subsequently gave her consent, and before the notes, or any of them, were due.

Mauie had obtained a rule to shew cause why the verdict on the ninth

plea should not be entered for the plaintiffs, or why there should not be judgment *non obstante veredicto*.

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Creswell on the same day moved for a cross-rule, on the ground that there was not sufficient evidence of a power given by *Norman* to *Innes* to indorse the bills in the style of the firm, after the dissolution of the partnership. It appeared that a letter had passed between *Norman* and *Innes* relative to the winding up of the business, which was read in evidence, and contained no authority to indorse the bills; but that *Norman*, subsequently to that, gave by parol an authority for this purpose, which the Court clearly held sufficient, and refused the rule.

Creswell and *Wallinger* shewed cause.—It is admitted that these notes were given without consideration; and that at the time they were indorsed to the plaintiffs, they had knowledge of that fact. The replication also admits that *Innes* was the principal debtor, and that defendant was liable only as surety. The question then arises as to the effect of giving time to the principal, without the consent of the surety; here there is no estoppel against the defendant, but against the plaintiff in denying it in this cause. The averment is, that the plaintiffs, “without the knowledge, privity, consent, or authority” of the surety, forbore and gave day of payment to the principal for a space of time which did not expire until long after the notes became due. The issue is simply whether the plaintiffs forbore or not; and as they did so, the issue was proved, and the verdict must be entered for the defendant on this plea. It was objected that the deed did not apply to the debt for which these notes were held as a security; but there was clearly a giving of time to *Innes* on the notes, and if so, the surety is discharged.

The next question is, whether the deed is duly executed; and it is said that it is not binding, because it was executed by one of the plaintiffs only, for himself and partners. But if it had been executed by all, the covenant not to sue for a certain time would not have operated as a release, but would only have amounted to a giving of time. In that respect it is equally as effective, though only one has executed it. If a bond had been given for part of the debt, and time had been given upon the whole amount, the bond could not have been put in suit while that time was running. Here there is such a giving of time to the principal as will operate as a discharge of the surety, *Rees v. Berrington* (a).—[*Parke, B.*—By this deed there is only a release as to *Norman*. It is usual to insert a proviso, that the deed shall operate as a release, if an action be brought within the time.]—If the fact of giving time or not is to be tried by the test of whether the instrument operates as a release, it is equally valid for that purpose, whether one or all execute it; but if it be put upon the ground, that if all had signed they could not have sued, as it would have been against good faith, the deed is as binding in that view, though executed by one only.

But though all the plaintiffs have not executed the deed, they cannot take this objection if they have acted upon it. It is similar to the case of a composition deed, respecting which it has been decided that a party who has acted upon it is bound by it, although the deed is not executed by him, *Butler v.*

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Rhodes (b), Jolly v. Hallis (c).—[Lord Abinger, C. B.—In those cases the creditor accepts the terms of the deed, and it would be a fraud upon the other creditors afterwards to enforce his debt.]—Here there was evidence from which the jury might reasonably presume that the plaintiffs were consenting parties. It is not necessary to dispute the doctrine laid down in *Harrison v. Jackson (d)*, because the circumstance of having acted under the deed distinguishes this case from that.

Next, does the consent of the defendant destroy the effect of the deed? As soon as the deed was executed, it was pleadable in bar, and the surety having been once discharged, it was not in the power of the principal, by any act of his, to bind him again, *Combe v. Woolfe (e), Bowmaker v. Moore (f)*. The consent was given after the deed was executed, and whatever might be its operation, it then took effect, and the principal could not renew the liability of the surety, nor could the surety become liable by a subsequent consent without consideration.—[*Parke, B.*—In those cases it does not appear that party ever consented. It would seem, from the case of *Mayhew v. Crickett (g)*, that a subsequent consent is binding.]—Suppose a release of a debt, and that the next day the debtor promised to pay; such promise would not be binding, unless supported by a sufficient consideration.—[*Parke, B.*—That is not the case of a release to a surety, but to a principal. Does the plea mean that there was no consent at any time, or that there was no consent at the time the forbearance was given?]—It means that there was no consent at the time the forbearance was given.—[*Parke, B.*—Then it does not exclude the presumption of a subsequent promise. To make the plea good, we must construe it that no consent was given at any time when it could be made available.]

Lastly, the proviso that persons holding bills, bonds, or notes of *Innes*, should not be prejudiced, as to their rights against third parties, by signing the agreement, will not prevent the discharge of the defendant from her liability as surety. It is clear they could not have sued *Innes* on any bills or notes of his. Then they cannot say that they have given time to the principal, but have inserted a provision, without the consent of the surety, to prevent the legal effect of such giving of time. In *Nicholson v. Revell (h)*, Lord Denman, C. J., says, "We give our judgment on the principle laid down in *Cheetham v. Ward (i)*, as sanctioned by unquestionable authority, that the debtee's discharge of one joint and several debtor, is a discharge of all."—[*Parke, B.*—The best answer to that proviso is, that it should have come by way of replication to the plea, if it was intended to be relied upon.]

Mauls and Bayley, in support of the rule, were stopped by the Court.

LORD ABINGER, C. B.—It is not necessary that the Court should give any opinion upon the signature to the deed by *Samuel George Smith* alone, or how far that signature, for himself and partners, would bind the whole firm, or how far it would operate to discharge the surety; our judgment will proceed upon the ground that the plea has not been proved. We must construe the plea so as to make it good if possible; and therefore it must be taken to

(b) 1 Esp. 236.
(c) 3 Esp. 228.
(d) 7 T. R. 210.
(e) 8 Bing. 156.

(f) 7 Price, 223.
(g) 2 Swanst. 185.
(h) 6 N. & M. 193.
(i) 1 B. & P. 630.

mean, that at no time before the notes were due was there any consent by the defendant to the enlargement of time and forbearance given to *Innes*. In that view of it, the plea was not proved. If the plea be taken to mean, that at the time only when the agreement was made, no consent was given by the defendant; then the plea would be bad, as not excluding the subsequent time before the notes became due, within which time, according to the case of *Mayhew v. Crickett*, a consent would be sufficient. The law, therefore, seems to be, that if the defendant, at any time before the notes became due, gave her consent, she would still remain liable. Here she did give her consent before the notes became due. The plea, therefore, was not proved, and the verdict must be entered for the plaintiffs.

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PARKE, B.—I am also of opinion that this plea was not proved, and that the verdict must be entered for the plaintiffs. I decline giving any opinion upon the question as to the effect of the deed signed by one partner only. We must put such a construction upon the plea as to render it good if possible. It must, therefore, be taken to mean, that the plaintiffs forbore and gave day of payment to *Innes* without such a consent by the defendant, as would revive or continue her liability. But it was proved that she did give her consent before the notes became due, which, according to the judgment of Lord Eldon, C., in *Mayhew v. Crickett*, is a valid revival of her liability. He there says, "I always understood that if a creditor takes out execution against the principal debtor, and waives it, he discharges the surety on an obvious principle, which prevails both in Courts of Law and Courts of Equity. On the other hand, if the surety afterwards make a promise to pay, he cannot object to that, as a promise without consideration; the promise is valid, not as the constitution of a new, but the revival of an old debt. So, when a bankrupt is discharged by his certificate, he cannot for that reason impeach a subsequent promise to pay a former debt, as a promise without consideration. So here, the consent is equivalent to a promise. It is not necessary that the defendant should have taken the notes up and replaced them in the hands of the plaintiffs. She has revived her liability, and the verdict must, therefore, be entered for the plaintiffs.

GURNEY, B., concurred.

Rule absolute accordingly.

ELIZABETH BARKER, WILLIAM BRUTON WROTH, and ANNA
MARIA his Wife v. GREENWOOD and another.

DEBT for the use and occupation of a farm, situate at *Hurst*, in the county of *Berks*. *Pleas*: first, never indebted; secondly, payment; thirdly, a set off; fourthly, that the defendants were chargeable only as ex-
Testator gave and devised to his wife, his daughter, and her husband, and the heirs of the survivor, on trust, to permit his wife to receive the *net rents* during her life, without prejudice to a rent-charge to his daughter, under her marriage settlement; and after the decease of his wife upon further trust, &c. :—*Held*, that the legal estate vested in the trustees.

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ecutors of *Charles Greenwood*, and alleging a set-off for money due to them as executors.

At the trial, before *Patteson, J.*, at the last *Berkshire Assizes*, it appeared that the plaintiffs sued as devisees in trust under the will of the *Rev. Francis Barker*, who died in 1830. The will contained the following devise: "I give and devise unto my wife, *Elizabeth Barker*, my daughter, *Anna Maria Wroth*, wife of the *Rev. William Bruton Wroth*, of *Eddlesborough*, in the county of *Bucks*, clerk, and the said *W. B. Wroth*, and their heirs, all and every my messuages, cottages, closes, farms, lands, grounds, hereditaments, and premises whatsoever, situate in *Hurst*, in the county of *Berks*, and elsewhere in the United Kingdom of *Great Britain and Ireland*, with their and every of their rights, members, and appurtenances, to hold to them my said wife, *Elizabeth Barker*, my said daughter, *Anna Maria Wroth*, and the said *William Bruton Wroth*, and the survivors or survivor of them, and the heirs of the survivor; on trust to permit and suffer my said wife, *Elizabeth Barker*, to receive and take all the net rents and profits of my said devised real estate, during the term of her natural life, to and for her own use and benefit; subject, nevertheless, and without prejudice to a certain rent-charge or annual payment of 100*l.* to my said daughter, *Anna Maria Wroth*, out of my said real estate, or some part thereof, under and by virtue of the settlement made on her marriage; and from and after the decease of my said wife, upon further trust to permit and suffer my said daughter, *Anna Maria Wroth*, to receive and take all the net rents and profits of my said real estate for and during the term of her natural life, to and for her own sole, separate, personal, and peculiar use and benefit, independent of her present or any future husband; and from and after the decease of my said wife and my said daughter, upon further trust to permit and suffer the said *William Bruton Wroth* to receive and take all the net rents and profits, &c., for and during the term of his natural life, to and for his own use and benefit; and from and after the decease of the survivor of them, my said wife, my said daughter, and the said *William Bruton Wroth*, I do give and devise, &c., unto and equally amongst all and every the child or children of the body of my said daughter, *Anna Maria Wroth*, by the said *William Bruton Wroth*, begotten or to be begotten, as shall be living at the time of the decease of them, my said wife, my said daughter, and the said *William Bruton Wroth*, and the lawful issue of any of the said children of my said daughter as shall be then dead, in equal proportions, share and share alike, such issue nevertheless standing in the place of, and taking only the part or share which his, her or their deceased parent or parents would have had or been entitled to, if they were living." There was then a power of sale given to the trustees which required the purchase money to be invested in the funds, in their names; and also the following proviso, for the appointment of new trustees. "Provided also, and I do declare my will and meaning to be, that from and after the decease of my said wife, it shall and may be lawful, to and for my said daughter, *Anna Maria Wroth*, and the said *W. B. Wroth*, or the survivor of them, by any deed or writing to be by them him, or her, respectively duly signed, sealed and delivered in the presence of, and to be attested by, two or more credible witnesses, to nominate and appoint one or two fit and proper person or persons to be a trustee or trustees for the purposes of this my will."

It was contended for the defendants, that upon the proper construction of the will, the legal estate was executed in *Mrs. Barker* during her life, and that she ought therefore to have sued alone. The learned judge reserved the point, and a verdict was given for the plaintiffs, damages 25*l.* 6*s.* 8*d.*, with leave to move to enter a nonsuit.

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Tyrwhitt having obtained a rule accordingly,

Ludlow, Serjt., and *Lumley* shewed cause.—The first use is executed in the trustees, and they take the legal estate as tenants in fee. It is the case of a devisee to *A., B., and C.*, to hold to *A., B., and C.*, and must be considered as equivalent to a devisee to the use of *A., B., and C.* In the second limitation, the words are “to hold to them, (the trustees) and the survivor and survivors of them, and the heirs of the survivor,” which would make them joint tenants in fee. The next question arises upon the declaration of trust, “to permit and suffer my said wife to receive and take all the net rents and property of my said real estate during her life, to and for her own use and benefit.” It is not disputed that under a devise to *A.*, to permit *B.* to receive the rents, the legal estate is executed in *B.*, *Doe, d. Leicester (a)*. But the devise is not only to permit her to receive the rents, but all the *net* rents and profits. Some meaning must be given to the term “net rents.” There may be quit-rents or expences attending the management of the estate, but these are not to fall on *Mrs. Barker*. The trustees are to pay them out of the gross rents; and in order to enable them so to do, they must have the legal estate, *Shapland v. Smith (b)*. The next trust is introduced with the words “upon further trust,” shewing by reference, that the former trust is to be of the same nature as the succeeding one. The language, too, of the prior trust is precisely the same as the succeeding one; therefore, as the testator intended that they should take the legal estate under the second limitation, it may be reasonably inferred that the former clause was governed by the same intention. But if *Mrs. Barker* took the legal estate, in case she committed a forfeiture the estate would devolve upon *Mrs. Wroth*, as heir at law, and she would not take to her separate use, but her husband would be entitled, in his marital right, to the rents and profits. Thus, if the trustees do not take the legal estate, the intention of the testator would be entirely defeated. Again, upon the death of the survivor of the three, there are contingent remainders to the children of *Mrs. Wroth*. How are they to be preserved, unless by giving the legal estate to the trustees. In *Biscoe v. Perkins (c)*, there was a devise to trustees, their heirs and assigns, for the life of the devisor’s son, to support contingent remainders in trust, to permit him to receive the rents for life, and it was held, that the trustees took the legal estate. There the testator expressly stated that the trustees should hold for the purpose of preserving contingent remainders; here, the testator has shewn his intention that his wife and daughter should take the profits for their sole use and benefit. Suppose the property sold under the power contained in the will, the purchase money must be invested in the joint names of the trustees; *Broughton v. Langley (d)* which was cited on the other side, is distinguishable; that was nothing more than a devise to

(a) 2 Taunt. 109.
(b) 3 Bro. Ch. C. 75.

(c) 1 Ves. & B. 485.
(d) 2 Ld. Raym. 873.

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trustees, to permit a person to receive the rents and profits. In *Bridges v. Wotton* (e), the trusts of the will were not set out; and that case cannot be considered as decisive upon this point. The intention of the testator must be collected from a reasonable interpretation of the whole will, from which it is apparent that the trustees are to take the legal estate.

Maule, Tyrwhitt, and Bros., in support of the rule.—With regard to the expression “net profits,” there is no case in which the precise words are found; but *White v. Parker* (f), is the nearest to the present case. There the testator devised land to trustees, in trust, to permit his wife and daughter to receive the clear rents of three parts, to their sole and separate use, and his son the clear rent of the fourth part, the trustees to pay all outgoings, to repair, and to let the premises; and it was held that the legal estate, as to all the four parts, vested in the trustees. But there certain duties were to be performed by the trustees, which rendered it necessary that they should have the legal estate, here there is no direction for them to lease or repair, or to pay the outgoings. The land-tax would be paid in the first instance by the tenant, and deducted from the rent. The word *net* has reference to the rent-charge previously created by the testator. The net rent is not subject to any thing which is to be deducted from the gross rent; but the testator’s meaning is, that his wife should take all the rents, after the trustees of the marriage settlement should have levied the rent-charge. The distinction between a devise in trust for *A.*, after payment of a rent-charge, and subject to a rent-charge, is adverted to in *Kenrick v. Lord Beauchamp* (g); in the latter case, the use is executed in *A.* It is true that the same words are used in the devise to *Mrs. Wroth*; but the reason is, that she is to receive both the rent-charge under her settlement, and independently of it, the rents and profits under the devise. The intention of the testator was to give the legal estate to his wife for life, with a vested remainder to his daughter for life. If the first trust had been to permit a *feme covert* to receive the rents and profits for her sole and separate use, then the case would have resembled *Harton v. Harton* (h). In *Bridges v. Wotton*, Sir *W. Grant* appears to contemplate precisely the present case. He says, “It is true, there is an immediate devise to them, (the trustees) of the real estate, *subject to the charges*, but not upon any trust that required their immediate interference. The first trust was to pay unto, and to permit and empower, *Mary Bridges* to receive and take the rents and profits during her life. It is by no means clear that this was not a use executed in her.” In *Wagstaff v. Smith* (i), which was a trust to permit a married woman to receive interest or dividends of stock to her own use, the Master of the Rolls says, “The case which I recollected was a petition in the cause of *Hovey v. Blakeman*, upon trust to pay the rents, profits, dividends, and interest to arise from a fourth part of the residue, in equal divisions, into the respective proper hands of the testator’s two sisters, so long as they should live; the same to be to their separate use. As it was expressed, I thought an absolute property was not intended to be given to them, so as to give a power of disposition; that it was a personal bequest to them, to be paid into their respective proper hands, and without a power of disposition; and I dismissed

(e) 1 Ves. & B. 137.

(f) 1 Bing. N. C. 573; 1 Scott, 542.

(g) 3 B. & P. 175.

(h) 7 T. R. 652.

(i) 9 Ves. 524.

the petition of an annuitant under a grant from one of them, leaving him to file a Bill, but intimating an opinion against it. This is very different: here are no words of controul, no words of restriction; the trustees are not even to pay, from time to time, into her hands upon her receipt, but she is to receive. Here are the very words to give the absolute property. *If land had been given to trustees on these terms, it would be a use executed, and the party would have the legal estate.* The power to appoint new trustees, which is not given until after the death of the widow, is strong to shew that the testator intended no interference upon the part of the trustees during her life. There is no inconsistency in the legal estate vesting in the widow in possession, and in the trustees in expectancy. No doubt the remainders are contingent, and might be destroyed by a forfeiture committed by the widow; but no case can be shewn in which, in the absence of any intention on the part of the testator to appoint trustees for the purpose of preserving contingent remainders, the Courts have interposed to insert words for that purpose. In *Biscoe v. Perkins*, there was an express declaration of the testator's intention, and the Court gave effect to it. Here the Court is called upon not to put a construction on doubtful words, but to add to words, which are plain and unquivocal.

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PARKE, B.—The Court has no difficulty in coming to the conclusion, that the rule must be discharged. The question is, whether the legal estate in the lands devised, vested in the first instance in the trustees mentioned in the will, or whether during the life of the widow, it vested in her by operation of the Statute of Uses. The learned judge who tried the cause, was of opinion that it vested in the trustees, and that therefore they were the proper plaintiffs on the record. The case has been very ably argued, and I must confess that I see no reason to differ in opinion from the learned judge. There is no doubt that the general rule of law is, that whenever there is a limitation to trustees and their heirs, the trustees take only that quantity of interest which the purposes of the trust require. Now, let us see whether in this case it is requisite that the trustees should take the legal estate during the life of the widow. It is now clearly settled, that where an estate is limited to trustees and their heirs, "upon trust to pay" the rents and profits to a person for life, there the trustees take the legal estate, because they must receive before they can make the required payments. But where the words are, "in trust to permit and suffer *A. B.* to have the rents and profits," there the legal estate is vested in the party. The law is clearly settled, whether rightly established or not, it is now too late to enquire. It is also equally settled, that where the testator expresses his intention that the trustees should do any act, as for instance, receive the rents, &c., that is sufficient to vest the legal estate in them, whatever words he used, *Gregory v. Henderson* (j), shews that very slight circumstances are sufficient for this purpose. There the devise was to trustees, to prevent and suffer the testator's widow to receive and take all the rents and profits; and it was declared that her receipt for the rents, with the approbation of the trustees, should be good and valid; and the Court held that the legal estate vested in the trustees to enable them

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to give such consent. In this case the trust is to suffer and permit the widow to receive the *net* rents ; and the question is, what is the meaning of the term "net rents." It has been ingeniously argued by Mr. *Tyrwhitt*, that it had reference to a charge on the estate previously created in favour of the testator's daughter, and that it meant the profits exclusive of that charge. The context of the will, however, will hardly admit of that construction, because the widow is to receive the *net* profits, without prejudice to the rent-charge to the daughter for life. Again by the next clause, the daughter is to receive the net rents for her sole and separate use for life ; and although that clause does not militate with the construction contended for by the defendant's counsel, still that is not the natural construction. Then, after the death of the widow and daughter, the estate is to go to the daughter's husband for life, and he is also to receive all the *net* rents and profits. At that time the rent-charge would be extinguished ; it is clear, therefore, that the term "*net* profits," could not there mean the profits with reference to that charge. I am at a loss to consider it as used in any other way than as contradistinguished from *gross*. It is equivalent to saying that the trustees are to receive the *gross* rents, and after deducting the land-tax, or any other charges on the estate, to pay over the proceeds to the wife for life. In order to do that, they must have the legal estate during the life of the wife. It is quite clear that they would have it after her death, because the trust is for the sole and separate use of the daughter. Besides, the intention of the testator will be best secured by giving the trustees the legal fee, although I do not wish to rest the case upon that ground ; because no case has been shewn in which the Courts held that the trustees take for the purpose of preserving contingent remainders, unless where the testator has expressly declared such intention. The clause respecting the appointment of new trustees has been referred to, as tending to shew that the trustees were not to interfere until that period ; but we think the meaning of that provision is, that the testator contemplated the death of his wife before that of the other trustees, which would cause a deficiency in their number. On the whole, therefore, it appears to me that, in order to carry into effect the object of his will, it is requisite that the trustees should take the legal estate during the life of the widow, and that therefore this action has been properly brought.

ALDERSON, B.—I am of the same opinion ; and will only add, that the same principle is laid down in *White v. Parker*, where a similar effect was given to the word *clear*, as we give to the word *net*, in the present case.

GURNEY, B., concurred.

Rule discharged

WAINWRIGHT and another, Assignees of SHACKELL, an Insolvent, v. CLEMENT and another.

Ex-heretor.

ASSUMPSIT. The first count of the declaration was for 1,000*l.*, money received by the defendants for the use of the plaintiffs, as assignees. Second count for a like sum, due to the plaintiffs as assignees, upon an account stated.

First plea; non-assumpsit, to the whole declaration; the *second plea* was not material; *third plea* to the first count, as to 84*l.* 19*s.* 11*d.* parcel, &c., that that was a sum of money belonging to *Shackell*, the insolvent, and being and remaining in the hands of the defendants, when he subscribed his petition, and executed an assignment of his estate and effects, as an insolvent debtor, and now remaining in the hands of defendants; and that *Shackell*, before and when he subscribed his petition, &c., was indebted to the defendants in 100*l.*, for work and labour, as attorneys; and that plaintiffs as assignees, before and at the time of the commencement of the suit, were indebted to the defendants in the amount thereof, then a set-off. *Fourth plea* to the first count, as to the like sum, a lien for work and labour by the defendants as attorneys for the insolvent.

Replication to the third and fourth pleas, as to the said sum of 84*l.* 19*s.* 11*d.* parcel, &c. that the said sum in the third and fourth pleas mentioned, came to the hands of the defendants, and was received by them, as in the said pleas mentioned, by means of a voluntary transfer and delivery thereof, by *Shackell*, theretofore and within three months next before the commencement of his said imprisonment, he, *Shackell*, then being in insolvent circumstances, made to defendants, they the said defendants, then being creditors of *Shackell*, and with the view and intention by the said *Shackell* of petitioning the Court for the Relief of Insolvent Debtors, for his discharge from custody, according to the form of the Statute; whereby, and by reason of the premises and of the Statute, the said transfer and delivery became void, as against the plaintiffs, as such assignees.

The rejoinder denied, that the sum of 84*l.* 19*s.* 11*d.*, in the third and fourth pleas mentioned, or any part of it, came to the hands of the defendants by means of a voluntary transfer or delivery (traversing the matters stated in the replication), upon which issues were joined.

The following were the particulars of the defendant's set-off. The defendants seek to set off in this action the sum of 46*l.* 13*s.*, being the amount of their general bill of costs, incurred by the insolvent, between the 14th of *March* and the 26th of *April*, 1837, both inclusive; also 1*l.* 11*s.* 1*d.* being the amount of their costs in the action of *Stedman and another v. Shackell*, incurred between the 13th and 21st of *February*, 1837, both inclusive; also 1*l.* 7*s.*, being the amount of their costs, incurred in the action of *Bartholomew and others v. Shackell*, incurred in *March* and *April*, 1837; also 18*l.* 1*s.* 10*d.*, being the amount of their costs, in the action of *Wainwright and another v. Shackell*, incurred between the 15th of *March* and 25th of

A. being in difficulties, and having been served with writs by several of his creditors, applied to the defendants, who were attorneys, for their advice and assistance. After several ineffectual attempts to make an arrangement, it was finally resolved, at a meeting of the creditors, that *A.*'s property should be immediately sold; thereupon *A.* employed an auctioneer for that purpose, and directed him to pay the balance of the proceeds (after deducting his own charges) to the defendants, which was accordingly done. Another meeting of the creditors took place, at which *St.* in the pound was offered, which being refused, *A.* went to prison, and obtained his discharge under the Insolvent Act. The defendants claimed to retain a portion of the money paid to them by the auctioneer in discharge of their bill of costs.—*Held*, in an action by the assignees to recover the money, that this was not a voluntary transfer in favour of a particular creditor,

within the meaning of 32d section of the 7 G. 4, c. 57.

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April, 1837, both inclusive; also *8l. 14s. 6d.*, being the amount of their costs in the action of *Nutt and others v. Shackell*, incurred between the 30th of *March* and 22d of *April*, 1837, both inclusive; also, *8l. 12s. 6d.*, being the amount of their costs in the action of *Blackmore and another v. Shackell*, incurred between the 14th and 25th of *March*, both inclusive. The above sums amount to *84l. 19s. 11d.*

At the trial, before *Gurney, B.*, at *Westminster*, at the Sittings after last *Trinity Term*, the following appeared to be the facts of the case. The insolvent *Shackell* was an upholsterer at *Southampton*, and in the early part of the year 1837, being in difficulties, and having been served with writs at the suit of several creditors, applied to the defendants, who were attorneys there, for their advice and assistance in his embarrassments, and they first commenced acting for him upon the 14th of *March* in that year. On the 31st of *March*, four actions having been commenced against *Shackell*, he called a meeting of his creditors, and proposed to pay *6s.* in the pound, but no arrangement was then made. On the 4th of *April*, another meeting was held, when it was resolved, that there should be an assignment of all the insolvent's property to trustees, for the benefit of his creditors. The defendants attended these meetings, as attorneys for the insolvent; and, as some of the parties who had commenced actions seemed still inclined to press them on, it was resolved, in order to prevent them from getting their full demands by judgments, to have an immediate sale of the insolvent's property. It appeared that *Shackell*, upon this resolution, employed a *Mr. Perkins*, an auctioneer, at *Southampton*, to sell the property, and at the time he employed him, he directed him to pay the balance of the proceeds of the sale (after deducting his own charges) to the order of the defendants. The sale accordingly took place on the 12th and 13th of *April*, and on the 15th, *Perkins* paid over a balance of *548l. 3s. 6d.* to the defendants. Upon the 17th of *April* another meeting of the creditors was held, and the result of the sale being ascertained, *Shackell* offered a payment of *5s.* in the pound, which was not assented to by some of the creditors, whereupon he determined to surrender, in discharge of his bail, in one of the actions which had been brought against him, which he did, upon the 25th of *April*, and went to prison. Upon the 29th he petitioned for his discharge, which he obtained upon the 21st of *June*. The plaintiffs were chosen assignees. The defendants discharged themselves of the *548l. 3s. 6d.*, which they received from *Perkins*, in the following manner.

| | £ | s. | d. |
|---|-----|----|----|
| Sum received - - - | 548 | 3 | 6 |
| Cash paid to provisional assignees - £ 378 3 6 | | | |
| To <i>Shackell</i> , afterwards allowed by Insolvent Court - - - - - 60 0 0 | | | |
| Paid <i>John Foot</i> , <i>Shackell's</i> landlord, by his direction, half a year's rent - 30 0 0 | | | |
| Retained for defendants' bill of costs - 85 0 0 | | | |
| | 553 | 3 | 6 |
| Overpaid into Court - - - £ | 5 | 0 | 0 |

This action was brought to recover 85*l.* the sum retained by the defend-

ants for their bill of costs. The bill of costs was put in by the plaintiffs, commencing on the 14th of *March*, 1837, (being within three months of the time of the insolvent's going to prison), and extending to the 26th of *April* in the same year. It appeared from the entries, that the defendants saw several of the creditors upon many occasions, and that they were well aware of the fact of their being the attorneys of the insolvent. The following were, among other entries, in the bill of costs, which was very long, and contained a complete history of all the transactions from the time of the defendants' employment.

"*April* 4th, Mr. *Braikenridge* and two clerks, (the *London* agents) attending the adjourned meeting of creditors, when, in consequence of the proposed surety having declined to become such, resolutions were made for an assignment of your effects, for the benefit of the creditors."

"*April* 7th (one of the defendants).—Long conference with you on the course now to be pursued, when, as Messrs. *Wainright* would get judgment in their action, and sue out execution by the 17th or 18th of the month, and if they succeeded in taking your goods, your other creditors would be exceedingly annoyed, it was determined, that you should sell them by auction, and deposit the produce, after retaining sufficient to keep your family, and carry you through the Insolvent Court; that you should then surrender in discharge of your bail, give an account of your property, and take the benefit of the Insolvent Act; arranging with you who should be employed to sell the goods, when Mr. *Perkins* was fixed on."

Upon these facts, the learned judge directed the jury to find a verdict for the plaintiffs for 80*l.* (deducting the 5*l.* overpaid by the defendants); and gave the defendant leave to move to enter a nonsuit, if the Court should be of opinion, that the direction given by the insolvent to the auctioneer to dispose of the surplus after the sale, as the defendant should direct, was not a voluntary transfer or delivery to them, so as to make it void against the assignees, within the meaning of the 32d section of the Insolvent Debtors' Act, 7 *Geo.* 4, c. 57.

Erle having obtained a rule accordingly,

Sir *F. Pollock* and *Hoggins* shewed cause.—The single question upon these pleadings is, whether the sum of 84*l.* 19*s.* 11*d.* came to the defendants and was received by them, by means of a voluntary transfer, or delivery thereof by *Shackell*, within three months before the commencement of his imprisonment, he being in insolvent circumstances, and with the view and intention of petitioning the Insolvent Court for his discharge from custody. And this question will turn upon the 32d section, of the 7 *Geo.* 4, c. 57 (a).

(a) Sec. 32. "That if any prisoner who shall file his petition for his discharge under this Act, shall, before or after his imprisonment, being in insolvent circumstances, voluntarily convey, assign, transfer, charge, deliver, or make over any estate, real or personal, secu-

rity for money, bond, bill, note, money, property, goods or effects whatsoever, to any creditor or creditors, or to any person or persons, in trust for, or to or for the use, benefit or advantage of any creditor or creditors, every such conveyance, assignment, transfer, charge, delivery, and

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By that section, every transfer made within the three months, must be treated as voluntary, with the exception of those cases, in which the creditor has used diligence and instituted a suit, or in some other way, obtained payment by compulsion. The first item in the bill of costs, and the order by the insolvent to the auctioneer to pay over the proceeds of the sale to them, both bear date within three months of the petition for the insolvent's discharge. It is evident in the entries in the bill, that *Shackell* was in insolvent circumstances; and it cannot be said that this was not a making over of his estate and effects for the benefit and advantage of a particular creditor. Under the circumstances the defendants were bound to have stated that they would not do the business on credit. The bill may be divided into two parts; the one, relating to the endeavours of the defendants to settle the actions which had been commenced, the other commencing from the 12th April, when it was first determined to sell all his effects. At the latter date the defendants were creditors for antecedent debts; and with respect to these bygone bills, they stand in the same situation as the other creditors. —[*Parke, B.*—It is difficult to say, that there is here any voluntary transfer.]—There is no evidence of compulsion—nor anything to shew that this was not a voluntary act. With regard to any lien which an attorney may have for business done, that cannot override the express words of an Act of Parliament. A voluntary payment within three months, although a discharge of a *bonâ fide* debt, is a fraudulent delivery within the Statute, *Herbert v. Wilcox* (b). The Statute extends to assignments made at any time, even a year previous to the imprisonment, if made with the view or intention of petitioning the Court, *Becke v. Smith* (c). The entries in the bill of costs clearly shew such intention.

Erle and *Manning*, in support of the rule.—This case cannot be said to fall within the decisions, respecting a voluntary preference. The money came to the hands of the defendants for the lawful purpose of making a rateable division among the creditors. To constitute a voluntary preference, there must be a delivery to a creditor by the insolvent himself. Here there is no transfer by the insolvent, nor does the money come to the defendant in his character of creditor. There is nothing to shew any intention in the insolvent that the defendant should be placed in a more advantageous situation than the other creditors. It may be said, that this was a voluntary act, inasmuch as it was not the result of threats or compulsion; but it is not a voluntary preference. There was nothing to make it compulsory on the defendants, to apply this money to the discharge of their own bill. They might have paid it over to the creditors, and sued the insolvent for their own demand. If the money had remained in the hands of the auctioneer, he would have had a right to detain enough to satisfy his own charges, before he paid over

making over, shall be deemed and is hereby declared to be, fraudulent and void, as against the provisional or other assignee or assignees of such prisoner, appointed under this Act: Provided always, that no such conveyance, assignment, transfer, charge, delivery, or making over, shall be deemed fraudulent and void, unless made within three months

before the commencement of such imprisonment, or with the view or intention by the party so conveying, assigning, transferring, charging, delivering, or making over, of petitioning the said Court for his discharge from custody under this Act.

(b) 6 Bing. 203.

(c) 2 M. & H. 191.

the proceeds, *White v. Bartlett* (d). The assignment to be voluntary must be made in favour of a particular creditor, and spontaneously, and without any pressure on his part to obtain it, *Arnell v. Bean* (e). Besides the plaintiffs can only claim such property as the insolvent possessed at the time of executing the assignment; therefore they are entitled to set off the amount of their costs, *Simms v. Simpson* (f).

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Lord ABINGER, C. B.—The question upon the pleading is confined to the amount retained by the defendants, in satisfaction of their bill. This is not a general action for money had and received, in which it is insisted, that the money was received for a particular purpose, and cannot be otherwise applied; but the question here is, whether this money came into the defendants' hands by any such voluntary act of the insolvent, as to make it a fraudulent transfer, as against his assignees, within the meaning of the 32d clause of the Insolvent Act. I have always understood the word "voluntary," in that clause, to have the same meaning as is given to the words, "fraudulent preference," in the Bankrupt Act. These words have found their way into the Statutes, and several decisions have settled their meaning, which is, that to constitute a fraudulent preference, the act must be the spontaneous, voluntary act of the party making the assignment or transfer, and made with a view to favour some one (or more) particular creditor. Now, let us see whether the facts here give the transfer such a character. Upon the evidence used on behalf of the plaintiffs it seems that, at a particular period, an attempt was made to procure sureties, which failed, and then appears the following entry in the bill of costs: "4th April.—Mr. Braikenridge and two clerks, attending the adjourned meeting of creditors, when, in consequence of the proposed surety having declined to become such, resolutions were made for an assignment of all your effects, for the benefit of the creditors. "This, therefore, was not a spontaneous act of the insolvent; it was a resolution passed at a meeting of the creditors. Now, it is admitted, that if done at the pressure of one creditor, it is not within the meaning of the word "voluntary." It seems to me, that the pressure of all the creditors, must have the same effect. Is, then, the handing over of the goods to *Perkins*, the auctioneer, for sale, a voluntary transfer? Another entry in the same bill, explains that "April 7th.—Long conference with you, on the course now to be pursued, when, as Messrs. Wainwright would get judgment in their action, and sue out execution by the 17th and 18th of the month, and if they succeed in taking your goods, your other creditors would be exceedingly annoyed, it was determined, that you should sell them by auction, and deposit the produce, after retaining sufficient to keep your family, and carry you through the Insolvent Court, that you should then surrender in discharge of your bail, give an account of your property, and take the benefit of the Insolvent Act; arranging with you who should be employed to sell the goods, when Mr. Perkins was fixed on." Then after the goods had been turned into money, what evidence is there of a voluntary payment to the defendants, for their own use? The goods are to be sold, and the money deposited, merely; that is not a proposal to pay their debt. There is no proof

(d) 2 M. & Scott, 515; 9 Bing. 387. (f) 1 Scott, 177.
(e) 1 M. & Scott, 151; 8 Bing. 87.

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that the insolvent ever said, "keep 85*l.* for yourself." Suppose the insolvent had gone so far as to say, "Pay the balance over to my assignees," and the defendants had said, "No, we shall pay ourselves:" it may be doubted, whether that would be a voluntary transfer. The money would be retained against the direction of the insolvent. In no sense can I see any evidence, that this money came to the hands of the defendants, so as to give the assignees a right to recover it, upon the provisions of the section. It is for them to shew that there is a fraudulent transfer; the *onus probandi* is upon them, to give some evidence of transactions, from which the jury might infer a voluntary act, on the part of the insolvent, to favour these particular creditors. No such evidence appears. I think, therefore, the rule must be made absolute.

PARKE, B.—I am also of opinion that the rule must be made absolute. I have certainly felt some doubt in the course of the argument, and am not altogether without it, at the present moment, but I think that the plaintiffs did not make a case of a voluntary transfer, within the meaning of the Act of Parliament. The action is brought for money had and received to the use of the insolvent's assignees, and the defendants have pleaded the general issue. Under that plea, I apprehend, all this defence might have been gone into. But they have also pleaded especially. [The learned judge stated the pleas and replication, and proceeded.] The defendants have a right to insist that the issue, as to the 85*l.*, is the only material one, because, if they succeed on that, they would be entitled to the general verdict. That brings us to consider whether the money received by the defendants, under the circumstances of this case, came to their hands by means of a voluntary transfer from the insolvent. It appeared that, being in difficulties, he applied to the defendants, as his attorneys, as early as the month of *March*. They attended, and advised with him on matters wholly unconnected with this transaction: when some sums in the bill of costs became due. After that there was a meeting of the creditors, and a resolution was passed, that the effects of the insolvent should be sold, and his goods placed in the hands of an auctioneer, who was named for that purpose, and, after retaining sufficient for the support of his family, that the produce should be deposited, but for what specific purpose does not appear. The goods are afterwards sold; and the act insisted upon, as the voluntary transfer or delivery, is an order given by the insolvent to the auctioneer, to dispose of the surplus according to the order of the defendants. In this way the money comes to their hands. It is contended on the part of the defendants, that this is not a voluntary transfer or delivery, first, because the defendants were not creditors at all, as the business was not completed; but it is clear from the bill of costs put in, that there was other business wholly unconnected with this, on which they might have sued. That ground, therefore, is not made out; next, it is said, that this act was not spontaneous; I do not feel inclined to agree with the observations of the Chief Baron, as the alleged transfer is not what takes place at the meeting of creditors, but the order to the auctioneer is the thing relied upon. That appeared to be the spontaneous act of the insolvent, though it resulted from advice given by the defendants, in their character of attorneys. I am not disposed to make the rule absolute on the ground of that not being a voluntary act. The cases have given a meaning to the word

"voluntary;" it must be an act proceeding from the insolvent, and of some benefit to a creditor. But the point not made out by the plaintiff appears to me to be, that this order, and the receipt of the money in pursuance of it, was a transfer within the meaning of the act. The act only means to render void such a transfer or delivery as will give a benefit to a creditor; the order was not intended to have that effect here, as the money was not to be paid to the order of the defendants, in their character of creditors, but as attornies. If it had appeared that the defendants, with the consent of the creditors, had agreed to hold this money, in deposit, for themselves and the other creditors, then I think it would have fallen within this section of the act, but that was not made out. It was not deposited with them in their character of trustees, but as agents of the insolvent. It does not therefore appear to have been a transfer for the benefit of any creditor.

GURNEY, B., concurred.

Rule absolute for a nonsuit.

Wood and another, Assignees of G. HAWORTH and W. HAWORTH, Bankrupts, v. SMITH.

ASSUMPSIT. The first count was for money received by the defendant for the use of the bankrupts, before their bankruptcy. Second count, for money received to the use of the plaintiffs, as assignees, since the bankruptcy.

Plea to the first and second counts, that although the sum of money in the second count mentioned, remained and was in the possession of the defendants after the said *G. Haworth* and *W. Haworth* became bankrupts, yet the same sum, and every part thereof, was in fact first received by the defendant, before the said *G. and W. Haworth*, or either of them, became bankrupt, and before the issuing of any fiat in bankruptcy against them, or either of them, to wit, on the 15th day of *April*, 1837, and from thence continually hitherto has remained and is in the possession of the defendant. And the defendant further says, that before and at the time of the date and the issuing forth of the fiat in bankruptcy, under and by virtue of which the said *G. and W. Haworth* were found and adjudged to be such bankrupts as aforesaid, to wit, on the 1st day of *May*, in the year aforesaid, the said *G. and W. Haworth* were and still are indebted to the defendant in 800*l.*, upon certain promissory notes theretofore made by them [*setting them out*], and which said sum of 800*l.* as aforesaid, due to the defendant upon the said promissory notes, remains and is due, and wholly unpaid to the defendant. And the defendant further says, that before and at the time of the date and the issuing forth of the said fiat of bankruptcy, under and by virtue of which the said *G. and W. Haworth* were found and adjudged to be such bankrupts as aforesaid, to wit, on the said 1st day of *May*, 1837, the said *G. and W. Haworth* were and still are indebted to the defendant in 1,000*l.*, for money before then lent by the defendant to the said *G. and W. Haworth*, at their request [*money paid, money due on an*

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To *assumpsit* for money received to the use of the assignees of a bankrupt, the defendant pleaded that the money was received before the bankruptcy, and that the bankrupt was indebted to him in a sum which he claimed to set off: *Held*, bad.

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account stated], which said last-mentioned sum was to be paid by the said *G. and W. Haworth* to the defendant, on request, but still remains due and unpaid to him. And the defendant further says, that when he gave credit to the said *G. and W. Haworth* in respect of the said promissory notes, and last-mentioned sum of money, or any or either of them, or any part thereof, in this plea respectively aforesaid, he, the defendant, had not notice of any act of bankruptcy by the said *G. and W. Haworth*, or either of them, committed. And the defendant further says, that the said sums of money, to wit, the said sums of 800*l.* and 1,000*l.* so due and unpaid to him the defendant, as in this plea aforesaid, exceed any demand of the said *G. and W. Haworth*, or either of them, before their said bankruptcy, or of the plaintiffs, as assignees, as aforesaid, since the said bankruptcy, in respect of the causes of action, or either of them, or any part thereof, in the first and second counts of the declaration mentioned, whereof the plaintiffs, before the commencement of this suit, had notice, and out of which said sums so due and unpaid to the defendant as aforesaid, he, the defendant, is ready and willing, and hereby offers to set off and allow the full amount of each demand. Verification.

Special demurrer, assigning for cause that the defendant, by his plea, endeavours to set off a debt due to him from the said *G. and W. Haworth*, against a debt due from the defendant to the plaintiffs, as assignees, on a contract with them as assignees; and that the said plea neither confesses, nor avoids, nor denies that the said sum in the said second count mentioned, was received for the use of the plaintiffs, as assignees as aforesaid, and is in other respects uncertain and insufficient, &c.

Cowling, in support of the demurrer.

Bramwell, in support of the plea, cited *Groom v. Mealey* (a), *Hulme v. Mugglestone* (b), *Simpson v. Sikes* (c).

PARKE, B.—The plea confesses, but does not avoid the cause of action. No action can be maintained for money received to the use of the assignees, unless the money was received after the bankruptcy, or if received *before* by way of fraudulent preference. If received *after* the bankruptcy, the debt due from the bankrupt cannot be set off in an action by the assignees, laying the promise to them. If received before the bankruptcy (as here admitted) the assignees must claim it as money paid by way of fraudulent preference. To that count, then, the defendant should have pleaded the general issue. Judgment must be for the plaintiff, unless the defendant amends, by confining the plea of set-off to the count for money received to the use of the bankrupt.

(a) 2 Bing. N. C. 138.
 (b) 3 M. & W. 38.

(c) 6 M. & Sel. 295.

FOSS v. RACINE, LONG, HARRISON, and another.

Eschequer.

TRESPASS for breaking and entering the plaintiff's house, and taking his goods. *Plea*, Not guilty. At the trial, before *Alderson*, B., at the *Middlesex* Sittings in this Term, it appeared that the plaintiff, who was tenant to the defendant *Long*, was indebted to him in seventeen weeks' rent; that the defendant *Racine*, who was a collector of the land-tax, had made several applications to *Long* for the payment of the land-tax due in respect of the premises occupied by the plaintiff, and that *Long* had refused payment, on the ground that the plaintiff had not paid him his rent. *Long* afterwards employed the defendant *Harrison* to distrain upon the plaintiff for the rent, and sent him, in company with the other defendant, *Racine* to procure payment of the land-tax from the plaintiff. *Racine* and *Harrison* accordingly proceeded to the house of the plaintiff; they found the door locked, and after knocking and demanding payment of the tax, and receiving no answer, they broke the door open and entered the house. *Long* afterwards made his appearance, and paid the defendant *Racine* the sum due for the land-tax. He then made a distress for the rent, and all the defendants left the premises. It was urged on behalf of the defendants, that *Racine*, the collector, was justified under the Statute 38 Geo. 3, c. 5, s. 17, in breaking open the door for the purpose of distraining for the land-tax. The learned judge being of a different opinion, directed the jury to find a verdict for the plaintiff; and the jury having found according to this direction, he gave the defendants leave to move to enter a nonsuit.

A collector of the land-tax is not authorized by the Statute 38 Geo. 3, c. 5, s. 17, to break open a dwelling-house for the purpose of a distress, without the assistance of a constable.

Platt now moved accordingly.—The 17th section of the Statute 38 Geo. 3, c. 5, s. 17, enacts, that when any distress is made for arrears of land-tax, the collectors shall be authorized "to break open, in the day time, any house, and upon warrant, under the hands and seals of any two or more of the commissioners, any chest, trunk, box, or other thing where any such goods are, calling to their assistance the constable, tithing-man or headborough within the counties, ridings, cities, towns, or places where any refusal or neglect shall be made." It is submitted, that the true construction of this section is, that the presence of a constable is requisite only where a chest is broken open, and not where a house is broken open for the purpose of taking a distress.

Per Curiam.—There is much ambiguity in the clause of the Act; but the words in the latter part of it override the whole section. There is more occasion for the presence of a constable when a collector of taxes is about to break open a dwelling-house than when a chest only is to be broken open.

Rule refused.

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CALVERT v. BAKER.

The defendant accepted a bill of exchange, payable generally. After the acceptance, the drawer, without his knowledge, made it payable at a certain banker's:—

Held, that the acceptor, in an action against him by the indorsee, who did not state the bill to be payable at any particular place, might prove these facts under the plea of *non acceptit*.

In answer to an application made to the defendant for payment of the bill, his attorney stated in a letter that the defendant had never made the bill payable at the banker's in question, nor at any other place in town, but had refused to pay it except at his own house. That the bill must have been altered as to the acceptance, and that the defendant would take such steps as the law would authorize on the subject. That he had been prepared for payment, and that the party might have his money by calling at the defendant's house:—*Held*, that this was not evidence under the account stated of any liability on the part of the defendant to pay the bill.

ASSUMPSIT by the indorsee of a bill of exchange against the acceptor.

The bill was not stated to be made payable at any particular place. Second count, account stated. The defendant pleaded that he did not accept the bill in manner and form as in the first count of the declaration stated; to the second count he pleaded *non-assumpsit*. At the trial, before *Alderson*, B., at the Sittings in this Term, it appeared by the evidence of the drawer of the bill, that at the time of the acceptance, the bill was not made payable at any particular place, but that the drawer had afterwards, without the knowledge of the acceptor, introduced into the bill the words "Payable at *Williams' & Co., Bankers*." The bill was presented at *Williams' & Co.*, and payment was refused; notice of the dishonour having been given to the defendant, and application made for payment, his attorney wrote the following answer:—

"Sir,

"Mr. *Baker*, of *Bulbrook*, has placed in my hands your letter relative to the dishonour of his bill for 40*l*. He never made that bill payable at *Williams & Co.*'s, nor any other place in town, but refused to pay it, except at his own house. The bill must, therefore, have been altered as to the acceptance and he will take such steps as the law will authorize on the subject. He has been prepared for payment, and the party may have his money by calling at *Bulbrook*."

It was not proved that any application was made at *Bulbrook* for payment of the money. The jury found that the bill had been altered without the defendant's consent, and, under the learned judge's discretion, they found a verdict for the defendant.

R. V. Richards moved for a new trial, on the ground of misdiscretion.—The defendant is not entitled, under a plea denying the acceptance, to avail himself of the alteration of the bill. If a contract which was once binding on the defendant has been rendered void by an alteration which makes a new stamp necessary, that circumstance ought to be specially pleaded. In *Walter v. Cubley* (a), which may be mentioned as an authority against this application, the bill was declared upon in its altered state. There the necessity of a special plea is almost admitted by *Alderson*, B., where he says "He has pleaded it specially, by saying that he did not accept the bill you declared upon and produced in evidence, but a different one."—[*Parke*, B.—Is it not competent for parties on a plea of *non est factum*, to prove that a deed has been altered after its execution?]
Secondly, the plaintiff is entitled to recover on the account stated, as the letter of the attorney contains an admission that the sum of 40*l*. is due to the plaintiff from the defendant, *Higmore v. Primrose* (b); *Clayton v. Gosling* (c).

(a) 2 Cr. & Mee. 151.

(b) 5 M. & Sel. 65; 2 Chit. Rep. 333.

(c) 5 B. & Cres. 360; 8 D. & Ry.

110.

Lord ABINGER, C. B.—The substance of the plea is, that the defendant did not accept the bill in the manner alleged in the declaration; and the plea is supported, when the plaintiff proves a bill in the form in which the defendant did not accept it. With regard to the other point, the defendant has not admitted his liability to pay the bill in question. He states that he never made it payable at *Williams & Co.*'s, but that the holder of the bill may have his money by calling at the defendant's house.

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PARKE, B.—In *Highmore v. Primrose*, there was an acknowledgment of a debt; but here the defendant makes his liability to pay the bill depend upon the previous performance of a condition by the other party. I cannot discover any express or implied undertaking to pay on request.

Rule refused (d).

(d) *Dawson v. M'Donald*, 2 Gale, 215; 2 Mee. & W. 26. *Field v. Woods*, Will. Woll. & Dav. 482; 7 Ad. & Ell. 114. *M'Donald v. Lyster*, 2 Gale, 226; 2 Mee. & W. 52;

WALLIS v. HARRISON and others.

CASE by reversioner, for injury to a close in possession of his tenant, by digging up the soil and making embankments, and a certain railway over it.

The defendants pleaded, fifthly, that before the said time, when, &c., and before the said close was the close of the plaintiff, to wit, on the 1st January, 1831, it was agreed between the defendants and the Dean and Chapter of *Westminster*, being then seised in fee of certain land, of which the close in question was parcel, that the defendants should have licence, liberty, power, and authority to enter into and upon the said close, and to form, make, and maintain, a certain main road and bye-ways and cuts, &c., and that the said Dean and Chapter should grant, ratify, and confirm the same to the defendants, and thereupon and long before the plaintiff, or any person whose estate or interest he now hath, had any estate or interest in the said close in which, &c., the said Dean and Chapter, on the said 1st January, 1831, gave and delivered to the defendants, at their request, possession and occupancy of the said way, over which the said main road and bye-ways and cuts, &c., now are, and at the said time, when, &c., had been constructed for the purpose of making the same, with leave, licence, and authority to the defendants, to enter and set out the same, &c., whereupon the defendants, before the plaintiff had any interest in the said close, entered, &c., for the purpose of making the said road, &c.; and the defendants further say, that afterwards, in pur-

To case by reversioner, for an injury to a close in the possession of his tenant, the defendant pleaded that before the close was the plaintiff's, it was agreed between the defendants and D. and C. (the owners in fee), that the defendants should have licence to enter the close and make a certain road, and that D. and C. should grant, ratify, and confirm the same to the defendants; that the defendants entered for the purpose of making the road; and that afterwards, in pursuance of

the said agreement and of the said possession, C. and D., by indenture, granted and demised, and granted, ratified, and confirmed to the defendants, such liberty to enter upon the said close and make the road.

Held, that the plea was bad on special demurrer, for not shewing the precise operation of the deed.

A parol licence from A. to B. to go upon the land, is countermandable at any time, whilst it remains executory. And if A. conveys his interest in the land to another, the licence is determined without notice to B.

The want of profit is not excused by an averment that the deed was delivered to the opposite party.

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suance of the said agreement and of the said possession so given, to wit, on the 26th October, 1833, by an indenture, made between, &c., the said Dean and Chapter, *granted and demised, and granted, ratified and confirmed, &c.*, unto the defendants, such full and free liberty, power, and authority, to enter upon the said close, and to form, make, and maintain the said road, &c., and maintaining the said possession, &c. The plea then justified the trespasses by virtue of the premises.

Sixthly, that the railway in question had formerly been the joint property of the defendants and the plaintiff, and that by indenture, bearing date, &c., made between the defendants and the plaintiff (which said indenture, sealed with the seals of the plaintiff and the defendants, the defendants were unable to bring into Court, *the same having been delivered* to the plaintiff). The plaintiff had disposed of all his interest in the said railway.

Special demurrer to the fifth plea, on the ground of duplicity and uncertainty; and to the sixth plea, on the ground of an insufficient excuse of profert.

W. H. Watson, in support of the demurrers.—Every deed must be pleaded according to its legal effect; here the deed is pleaded both as a grant and as a confirmation, either of which would have been an answer. It is also uncertain, whether the deed or the prior licence is relied upon. If the licence be relied upon, there is no excuse in law, since it is not binding upon a subsequent owner of the soil, unless it be by deed. The sixth plea is bad, in not sufficiently excusing the want of profert; the deed should have been alleged to be still in the possession of the plaintiff, *Read v. Brookman (a)*.

Hoggins, contrd.—It is conceded that the sixth plea cannot be supported. The fifth plea is good: it admits the trespass, and justifies it under a licence from the former owner. The transfer of the estate may operate as a revocation of that licence, but the defendants cannot be made chargeable until after notice, *Webb v. Paternoster (b)*.—[*Parke, B.*—That has been treated as the case of an executed licence for a consideration, *Howlins v. Shippam (c)*.]—There is a distinction between the case of a person seeking to enforce a licence, and where he merely uses it as an excuse for a trespass. If the Dean and Chapter could not have treated the defendants as trespassers without notice, neither can the plaintiff who claims under them.—[*Alderson, B.*—The plea does not allege that there was no notice.]—It lies on the plaintiff to aver notice; not on the defendants to deny it.

W. H. Watson, in reply, cited *Winter v. Brockwell (d)*.

Lord ABINGER, C. B.—I am of opinion that the fifth plea is bad, on special or general demurrer. It is an attempt to shew some species of title or excuse under colour of a deed, the precise operation of which is not set forth. If the deed had been executed before the plaintiff had any interest in the property, it would have been a good defence, if pleaded as a confirmation of a

(a) 3 T. R. 151.
 (b) Palmer, 72.

(c) 5 B. & C. 221.
 (d) 8 East, 308.

parol authority to make a railroad. But the plea does not state with sufficient distinctness, whether the deed was executed before or after the plaintiff became interested in the *locus in quo*. I am also of opinion that the plea is bad upon general demurrer, because I apprehend that a mere parol licence to enjoy an easement, (which is all that is pleaded here), does not bind the grantor, after he has transferred his interest in the land to another. If a man permitted a neighbour to pass over his land, and afterwards sold his estate, it would be very hard if the grantee were bound by that licence. Therefore, it does not appear by the plea that the defendants have any title or excuse for the trespasses. Then it is said by Mr. *Hoggins* that, at all events, the defendant is excused until he has received notice of the plaintiff's interest in the property. That is new law to me, for I do not apprehend that a man, who trespasses on the land of another, is entitled to any notice before he can be charged as a trespasser; but even admitting it to be so, in order to make the excuse good, it is incumbent on the defendants to shew that they had no notice; for though a party is not bound to prove a negative, in order to make his title good, yet he is bound to shew the circumstances upon which he rests his justification.

PARKER, B.—I am also of opinion that the plea is bad. If the justification rests upon a supposed grant from the Dean and Chapter, I think the plea bad on special demurrer, because it does not state at what time the deed was executed. Then, as to the question respecting the licence, the plea is bad in substance; for we are to consider whether a licence by a former owner to go, from time to time, on the close to make a railroad, is countermandable *before* any expence is incurred. If it had appeared that the countermand took place after expence incurred, the case would have deserved consideration, in consequence of the decision in *Webb v. Paternoster*. But here the licence is executory; and it appears to me that a parol executory licence is countermandable at any time; it is merely an authority to go upon the soil of the grantor. If the owner of an estate grants to another, by parol, a right to pass over his close, and afterwards conveys away that close, there is an end of the licence. *Webb v. Paternoster* is distinguishable, because that was the case of an executed licence; such also was *Winter v. Brockwell*.

GURNEY, B., concurred.

Judgment for the plaintiff

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BOYDELL v. JONES.

The declaration stated that the plaintiff was an attorney, and that certain orders had been made by one of the judges of Q. B. for setting aside proceedings, with costs, in an action in which the plaintiff was the attorney of the then defendant, and that the costs were taxed by one of the Masters. That sharp practice in the profession of an attorney is, and is considered to be and to import disreputable practice, and discreditable to the attorney adopting it. Yet the defendant intending to cause it to be believed that the plaintiff had been guilty of sharp practice in the said action, and had been reprimanded for it by the Master, published of him the following false, ironical and libellous matter:—“An honest lawyer” (thereby meaning the plaintiff, and intending to represent that he was not an honest lawyer). “A person of the name of C. B. was severely reprimanded the other day by one of the Masters of Q. B. for what is called sharp practice in his profession” (meaning and alluding to the plaintiff’s practice with respect to the said orders; and that such practice was sharp practice as aforesaid): *Held*, that the charge that the plaintiff had been guilty of sharp practice, as explained by the prefatory averment, was clearly libellous.

Semble, that the allegation that the defendant ironically called the plaintiff an honest lawyer, coupled with the innuendo, was sufficient to shew that the term was used in a libellous sense, without any prefatory averment.

On special demurrer to a plea, if the defendant objects that the declaration is bad, and any part of it is good upon general demurrer, the plaintiff is entitled to judgment.

LIBEL. The declaration stated, that whereas the plaintiff, for a long time before, and at the time of the committing of the grievances by the defendant, as hereinafter mentioned, resided and still does reside in *Devonshire-street, Queen-square, London*, and had been, and was, and still is an attorney of the Court of our Lady the *Queen*, before the *Queen* herself, and had used, exercised, and carried on the profession and business of attorney at law, with great credit and reputation; and whereas before the time of the committing of the grievances by the defendant, as hereinafter mentioned, certain orders had been made by one of the judges of the said Court of our Lady the *Queen*, before the *Queen* herself, for setting aside, with costs, certain proceedings in a certain action then pending in the said last mentioned Court, in which action the now defendant was the attorney of the then plaintiff, and the now plaintiff was the attorney of the then defendant; and before the time of the committing of the grievances by the now defendant, as hereinafter mentioned, the said costs had been and were ascertained, and taxed by one of the Masters of the said Court, and whereas before and at the time of the committing of the grievances by the now defendant, as hereinafter mentioned, sharp practice in the profession of an attorney was and is, and was and is considered to be and import disreputable practice, and practice discreditable to the attorney adopting or pursuing the same, whereof the now defendant then had notice; yet the now defendant, well knowing the premises, but contriving and falsely and maliciously intending to injure the now plaintiff in his good name, fame, and credit, and also in his said profession and business of an attorney at law, and to cause it to be suspected and believed that the now plaintiff had been guilty of such sharp practice as aforesaid in the said action, and that he, the now plaintiff, had been reprimanded by the said Master, for such practice as aforesaid, in the said action, &c., heretofore, to wit, on, &c., wrongfully, maliciously and injuriously composed and published a certain *ironical*, false, scandalous, malicious, and defamatory libel of and concerning the now plaintiff, and of and concerning him in the way of and in respect to his said profession and business of an attorney at law, and of and concerning the said action, and of and concerning the practice of the now plaintiff as such attorney, with respect to the aforesaid orders, then wrongfully supposed by the now defendant to be such sharp practice as aforesaid, and of and concerning the said Master, containing therein the *ironical*, false, &c., matter following, of and concerning the now plaintiff, &c. &c. (that is to say), “*An honest lawyer*, (thereby meaning the now plaintiff, and intending to represent that he was not an honest lawyer). A person of the name of *Charles Boydell*,

(meaning the now plaintiff), an attorney in *Devonshire-street, Queen-square*, was severely reprimanded by one of the Masters of the *Queen's Bench* (meaning the aforesaid Master), the other day, for what is called *sharp practice* in his profession; (meaning and alluding to the now plaintiff's practice, with respect to the aforesaid orders in the said action, and that such practice had been and was sharp practice as aforesaid,) by means of which, &c.

The defendant pleaded *first*, Not guilty; *secondly*, a justification; *thirdly*, as to the composing and publishing the whole of the said libel in the declaration mentioned, excepting the words "an honest lawyer," that before the composing and publishing the said libel in the declaration mentioned, to wit, on, &c., he the said plaintiff had been and was severely reprimanded by one of the Masters of the *Queen's Bench*, for what is termed "sharp practice" in his, the said plaintiff's profession, &c. Verification.

Special demurrer, assigning for causes that the said plea is a mere partial repetition of the libel, and neither traverses nor confesses and avoids the declaration; and that, as a justification, the plea is defective, in not justifying, except argumentatively, the imputation on the plaintiff of having been guilty of sharp practice in his profession; and that the instance or instances, and act or acts, of alleged sharp practice, should have been shewn in the plea; and that, even if one of the Masters of the *Queen's Bench* had taken upon himself to reprimand the plaintiff, that would not have justified the defendant in publishing that fact to the world; and for that the plea does not justify the innuendo, that the plaintiff had in fact been guilty of sharp practice; and for that the said libel is not divisible, and that the defendant should have justified the *ironical words* "an honest lawyer," in the sense imputed in the innuendo in that behalf; and that the plea is bad, as amounting to the general issue, inasmuch as it gives a mere narrative, without vouching the truth of the fact of "sharp practice;" and that the said plea, to have been consistent, should have traversed the innuendo, &c.

Joinder in demurrer.

Channell, in support of the demurrer, was stopped by the Court.

Ogle, for the defendant, admitted that he could not support the plea, but argued that the declaration was bad.—[*Parke*, B.—The words charged in the declaration are clearly libellous. It alleges that the defendant called the plaintiff an honest lawyer, with an averment that he meant to represent that the plaintiff was not an honest lawyer. Then the declaration says, that the defendant charged the plaintiff with being guilty of sharp practice, which is averred to mean disreputable practice. That is a libellous imputation.]—There is no prefatory averment as to the meaning of the term "honest lawyer;" those words must therefore be taken in their ordinary sense.—[*Parke*, B.—The declaration states that the defendant composed and published an *ironical* libel of the plaintiff, and that he called him an "honest lawyer," thereby meaning that he was *not* an honest lawyer, that is sufficient.]—An innuendo, unconnected with any prefatory averment, cannot enlarge the sense of a libel, *Goldstein v. Foss* (a).—[*Parke*, B.—In *Regina v. Dr. Brown* (b), *Holt*, C. J., says, that an information will lie for speaking *ironically*. But

(a) 2 Y. & J. 146.

(b) 11 Mod. 86.

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the objection arises as upon a general demurrer, and the Court cannot give judgment for the defendant, if there appears upon the declaration any matter which is libellous. The charge that the plaintiff had been guilty of sharp practice is clearly so, and is sustained by a proper prefatory averment.]—Suppose a declaration, in an action of *debt*, by indorsee against acceptor of a bill of exchange contained two counts, one on the bill, which would be clearly bad, and another good count; if the defendant pleaded to the whole declaration a plea which was specially demurred to, might not the defendant object that one of the counts was bad on general demurrer.—[*Parke, B.*—No; the plaintiff might enter a *nolle prosequi* as to the bad count. Here there is a demurrer to that part of the declaration which is good; then how can the Court give judgment for the defendant.]—Then there is a further objection: the libel is alleged to be spoken against the defendant, in his character of attorney; but there is no allegation that at the time of the committing of the grievance he was still in practice as an attorney. Consistently with the statement in the declaration, he may have long ceased to practise.

PARKE, B.—In order to make out the libel, I am disposed to think it sufficient to allege that the defendant *ironically* called the plaintiff “an honest lawyer.” But if not, as the objection arises as upon general demurrer, and some part of the declaration is clearly libellous, the demurrer is too large.

Judgment for the plaintiff.

PARKE, B., afterwards said—I take this opportunity of stating, that the case of *Ferguson v. Mitchell*, (respecting a demurrer being too large) is incorrectly reported in 2 *Crompton, Meeson*, and *Roscoe*, 692 (c). What I intend to say was, that if there be a special demurrer to the whole declaration, and one of the counts be good, the demurrer being too large, the plaintiff is entitled to judgment, and the defect may be cured by entering a *nolle prosequi* as to the bad count.

(c) S. C. 1 Gale, 348; 4 Dow. P. C. 524.

HARRISON v. TIMMINS.

By a local Act, 4 Will. 4, it was enacted, that actions against the West Cork

BY a local Act of Parliament passed in the 4th Will. 4, intituled, “An Act to encourage the working of Mines and Quarries in *Ireland*, and to regulate a Joint Stock Company for that purpose, to be called The West Cork Mining Company might be brought against the person who should be, for the time being, a managing director, or against any one director for the time being of the said company, as the nominal defendant or party proceeded against on behalf of the said company; and that no action against the company, in the name of such managing director or director, should abate or be discontinued by the death, resignation, removal, or disqualification of such managing director or director. By another local Act, 1 Vict. it was enacted, that it should and might be lawful for any person or persons entitled to take out execution for or in respect of any judgment against a managing director, or any other director as a nominal defendant on behalf of the company, to levy the amount of his damages and costs upon the reserved fund of the company, and all other property whatsoever belonging to the company.

Held, that the plaintiff, who had obtained judgment against the defendant as a managing director, was not entitled to issue execution against him personally.

Mining Company, it was enacted, that certain persons should be empowered to search, &c. for mines; and should for those purposes be a Joint Stock Company, by the name and description of "The West Cork Mining Company." By section 3, it was enacted, that actions might be brought in the name of the managing director, or of any one director for the time being, as the nominal plaintiff; and that actions might be brought against the person who should be, "for the time being, such managing director, or against any one director for the time being of the said company, as the nominal defendant or party proceeded against for and on behalf of the said company;" and that no action by or against the company, in the name of such managing director or director, should abate or be discontinued by the death, resignation, removal, or disqualification of such managing director or director.

By the 8th section of another local Act of Parliament, 1 *Vict.* c. 88, passed to enlarge and amend the provisions of the above Act, after reciting that doubts had arisen as to the manner of levying execution upon judgments recovered against the company, and that it was expedient to remove such doubts, it was thus declared and enacted, "It shall and may be lawful for any person or persons entitled to take out execution for and in respect of any judgment already obtained, or hereafter to be obtained against any managing director, or any other director as a nominal defendant for and on behalf of the said Company, to levy the amount of his, her, or their damages and costs upon the *reserved fund* of the said company, and *all other property whatsoever* belonging to the said company."

The plaintiff having obtained judgment against the defendant, one of the managing directors, and having taxed his costs, obtained a rule to shew cause why the defendant should not pay him the amount of his damages and costs, or why the plaintiff should not be at liberty to sue out execution against the defendant.

Cresswell and *J. Henderson* shewed cause.—The plaintiff seeks by this motion to take the opinion of the Court upon the legality of his proposed execution. He has availed himself of a statutory mode of suing, and now desires a common law execution. The defendant is not personally liable; he is a nominal defendant only, and is not shown to be a partner. The plaintiff must resort to the funds of the company. They cited *Bartlett v. Pentland* (a), *Wormwell v. Hailstone* (b), *Vice v. Lady Anson* (c).

Sir *John Campbell*, A. G., and *Bagley*, *contrâ*.—The members of the company are partners, and not a corporation. They are made so by the Act of Parliament, and therefore their separate property is liable. In *Bartlett v. Pentland* there was no suggestion that the defendant was a partner, and he was not a party to the record. *Wormwell v. Hailstone* is not in point. The 8th section of the Act, 1 *Vict.*, does not limit the responsibility of the individual shareholders. Acts of this kind are to be strictly construed, as they may be considered to be framed by the adventurers themselves. They cited *Rex v. The St. Katharine Dock Company* (d), *Vansandau v. Moore* (e).

Cur. adv. vult.

The judgment of the Court was afterwards delivered by

(a) 1 B. & Adol. 704.

(b) 6 Bing. 668; 4 M. & Pa. 512.

(c) 7 B. & Cr. 409.

(d) 1 Nev. & Man. 121; 4 B. & Adol.

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(e) 1 Russ. 441.

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PARKE, B.—In this case a verdict had been recovered by the plaintiff against the defendant, as nominal defendant on behalf of the *West Cork Mining Company*; and an application was made to the Court for a rule to shew cause why the defendant should not pay the amount recovered, or why the plaintiff should not be at liberty to issue execution for the amount against the defendant. It would be sufficient, in order to dispose of this application, to say, that the Court could not grant any rule to pay money, which they are not prepared to enforce by attachment, in case it was disobeyed; and that if the plaintiff is entitled to issue execution against the defendant, he may do so without the leave of the Court. But we are not disposed to discharge the rule on this ground; and we have been anxious to give the question full consideration, and to afford the plaintiff a remedy upon his judgment, by some modification of the rule, if, upon the construction of the Acts of Parliament establishing the Company, we are enabled to do so. We think, however, that the defendant can in no way be made personally liable, and the rule must therefore be discharged. The 4 & 5 *Will.* 4, c. 69, s. 3, provides for actions against the Company; it is as follows: [The learned Baron here read the section of the Act.] Upon this section alone it would seem that the director for the time being, who should be selected as a defendant, could not be made personally responsible: he is a nominal defendant; he continues so, though he should resign, be removed, or disqualified, and so be totally disconnected with the company; his name would still be used, though he should die: and as the action is to be brought against a director at the time the suit is instituted, he may be a person who was a perfect stranger to the company when the cause of action accrued. We cannot suppose, therefore, that the legislature meant such a defendant to be personally liable. But it would be very unjust if they had not provided some remedy; they might have enacted, that after a recovery against a nominal party, each of the partners, at the time the cause of action arose, should be individually liable, a remedy which was given by the Statute establishing the *St. Patrick's Insurance Company*, upon which the question arose in the case of *Bartlett v. Pentland*; or they might have enacted, that each partner, at the time of the action brought, should be responsible, which would be a strong measure, but which was nevertheless enacted by the same Statute. But this Act of Parliament gives no such remedy: it does, however, provide, by the 16th section, (explained by the subsequent Statute, 1 *Vict.* c. 88, s. 8), that it shall be lawful for one who has recovered judgment against a nominal defendant, to levy the amount on the reserved fund, or on any other property of the company; and this remedy, which is thus provided, is one of a different character from that which the creditor would have had at common law if he had sued the whole of the partners, for he could only have taken the joint or several property of those who were partners at the time of the contract; but this Act enables him to take all the joint property of the partners at the time of execution executed, whether they were partners or not at the time of the contract. The effect of the provision in both Acts is, to make the company a *quasi* corporation, with the privilege to sue and be sued by a mere name, with an exemption of personal liability on the part of its members, and a liability of all joint stock property, whenever acquired. We, therefore, think that the defendant cannot be made in any way personally responsible; and the rule must be discharged.

Rule discharged.

Sir W. H. JOLLIFFE, Bart. v. MUNDY.

Eschequer.

CRESSWELL had obtained a rule *nisi*, for the Master to review his taxation of the defendant's costs. In *Easter Term*, 1836, an ejectment was brought against the defendant, in the Court of *King's Bench*, on the several demises of the plaintiff, Sir W. H. Jolliffe, and Col. Hyllton Jolliffe, when a verdict was found for the lessor of the plaintiff, and a writ of possession was executed. An action was afterwards brought in this Court by Sir W. H. Jolliffe alone, for the mesne profits, when the plaintiff was nonsuited, on the ground that the legal interest in the premises appeared to be in Col. Jolliffe; but leave was reserved to the plaintiff to move to enter a verdict for him, with nominal damages. In last *Easter Term* a rule was obtained for that purpose, or for a new trial; and in *Trinity Term* the rule was made absolute for a new trial, but was silent as to costs. No further step was taken in that cause, but another action was commenced in this Court for the same mesne profits, in the name of *John Doe*; whereupon a rule was obtained, calling on the plaintiff to shew cause why the proceedings in the latter action should not be stayed, unless the cause of *Jolliffe v. Munday* was discontinued. Cause was shewn at chambers against that rule, which was made absolute. There were contradictory statements in the affidavits as to whether the rule for a new trial, which was drawn up by the plaintiff, was served or not. The plaintiff's attorney had given notice of trial at the last Summer Assizes, which was afterwards countermanded; and the defendant's attorney gave notice of trial by proviso, at the same assize, which was also countermanded. On the 25th *October*, the plaintiff obtained and served a rule to discontinue, with an appointment to tax the costs. The defendant claimed the costs of the trial, which the Master refused to allow, on the ground that if the cause had been again tried, the defendant would not have been entitled to the costs of the first trial.

The plaintiff having been nonsuited in an action for mesne profits, a rule was made absolute for a new trial, which was silent as to costs. Another action was commenced for the same mesne profits, in the name of *John Doe*, whereupon a rule was made absolute for staying proceedings therein, unless the previous action was discontinued. The plaintiff's attorney gave notice of trial in the first action, which was afterwards countermanded, and the defendant's attorney gave notice of trial by proviso, which was also countermanded. Subsequently the plaintiff discontinued:—*Held*, that the defendant was not entitled to the costs of the trial.

Erle shewed cause.—No mention having been made respecting costs in the rule for a new trial, the defendant is not entitled to them. The discontinuance of the suit could give no right to costs which did not exist at the time it took place. In *Peacock v. Harris* (a), a verdict having been found for the plaintiff, a new trial was granted, on the ground of the admission of improper evidence: the plaintiff gave a fresh notice of trial, whereupon the defendant withdrew his plea, and suffered judgment by default, and a writ of inquiry was executed; it was held that the plaintiff was not entitled to the costs of the first trial. If in this case the costs had been directed to abide the event, the defendant would not have been entitled to them, *Howorth v. Samuel* (b). So where the Court granted a rule for a new trial on the application of the defendant, and the plaintiff applied to amend his declaration, but discontinued the action to avoid paying the costs of the former trial, as the condition of the amendment; it was held that the defendant was not entitled to the costs of the trial; *Gray v. Cox* (c), *Porter v. Cooper* (d), and *Newbery*

(a) 5 A. & Ell. 449; 2 Har. & Woll.

281, 456; 1 Nev. & P. 240.

(b) 1 B. & A. 566.

(c) 5 B. & C. 458; 8 D. & B. 220.

(d) 2 C. M. & R. 232; 1 Gale, 149.

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v. Colvin (e), are also in favour of the plaintiff; *De Rutzen v. Lloyd* (f) is distinguishable. There, after the plaintiff had obtained a verdict, a rule for a new trial was granted; the plaintiff drew up the rule and served it on the defendant, who informed the plaintiff that he would not avail himself of it; it was the same therefore as if no step had been taken after the verdict for the plaintiff. In *Jackson v. Hallam* (g), the defendant, after having obtained a rule for a new trial, gave a *cognovit*, which the Court considered equivalent to an admission of a want of merits. *Sweeting v. Halse* (h), was decided on the authority of *Jackson v. Hallam*. Ulterior proceedings cannot create a liability for costs which did not exist at the time the new trial was granted.

Cresswell and *Moody*, in support of the rule, referred to *Sweeting v. Halse*, *Gray v. Cox*, *Porter v. Cooper*, *Peacock v. Harris*, *De Rutzen v. Lloyd*, and *Jackson v. Hallam*.

Cur. adv. vult.

PARKE, B.—In this case the plaintiff was nonsuited at the trial of an action for mesne profits, with leave reserved by the learned judge to enter a verdict for nominal damages. A rule was made absolute afterwards to set aside the nonsuit, but not to enter the verdict, and a new trial was ordered. The plaintiff drew up and served the rule absolute, but instead of proceeding to trial, obtained a rule to discontinue, on payment of costs, having, in the mean time, brought another action in the name of the nominal plaintiff; and the question is, whether he is to pay the costs of the former trial.

Supposing that there was no previous decision on this subject, there would seem to be little doubt as to the course which ought to be pursued. The plaintiff must be taken to have been improperly nonsuited at the trial, and the Court to have corrected the error of the judge; and in pursuance of the invariable rule in such cases, each party would have to bear the costs of the abortive trial, the Court annulling that proceeding, and replacing each in the situation in which he stood before. If the plaintiff has declined to proceed afterwards to trial, and left the defendant to his remedy, he must have carried the cause down to proviso, and having obtained a nonsuit, he would then have been entitled to the costs of the latter, but not of the former trial. If instead of putting the defendant to this useless expence, the plaintiff applies to discontinue, it seems reasonable to grant him that privilege, just as if he had applied before the first trial, and to save the defendant the payment, in the first instance, of the costs of an useless trial by proviso, and the plaintiff, from the ultimate liability to reimburse such part as would be allowed on taxation. This seems the reasonable course to follow, if there is no authority to the contrary.

It is argued that there is:—and this makes it necessary to examine the cases which have been decided on this subject, and which are unfortunately somewhat conflicting.

Where the first trial was abortive, in consequence of a defective statement of a special case, and a new trial was ordered, the party ultimately succeeding was held not entitled to the costs of the first trial, in *Hankey v. Smith* (i), and *Smith v. Haile* (j). In *Booth v. Atherton* (k), it was held, that where

(e) 2 Dowl. P. C. 415.

(f) 5 Ad. & Ell. 463; 1 Har. & Woll.

735.

(g) 2 B. & Ald. 317.

(h) 9 B. & C. 369, n; 4 M. & R. 545.

(i) 3 T. R. 507.

(j) 6 T. R. 71.

(k) 6 T. R. 144.

the first trial was useless from the same cause, a defendant afterwards giving a *cognovit*, was bound to pay the costs. The previous decision of *Smith v. Haile* was not cited in the last case, and the Court gave no reasons for their judgment. It appears, however, to have turned upon the fact that the defendant gave a *cognovit*, and was thereby supposed to have acknowledged that he had originally no ground of defence to the action, and ought not to have put the plaintiff to the expence of a trial. This reason was given for a similar course, in the case of *Jackson v. Hallam*, where a verdict for the plaintiff was set aside for a mistake of the judge, and a new trial was granted, but the defendant afterwards suffered judgment by default, and gave a *cognovit* for the damages. It may be doubted whether this reason is quite satisfactory, for a person may suffer judgment by default, or even give a *cognovit*, without necessarily admitting that the former verdict was right upon its merits; the death or absence of witnesses, or the fear of further expence may have induced such a course. It is difficult to distinguish a judgment by default, with a *cognovit* for the damages, from a simple judgment by default, or a judgment by default, after leave to withdraw the defendant's pleas: and yet in a case so situated, in *Peacock v. Harris*, the Court of King's Bench refused to allow the costs of the former trial which had failed of effect, and a verdict for the plaintiff had been set aside for misdirection of the judge.

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This decision, therefore, must be justly considered as having greatly shaken the authority of *Jackson v. Hallam* and the cases founded on that decision. One of these was that of *Sweeting v. Halse*, which bears the closest resemblance to the present. The verdict was for the defendant, leave given to move to enter it for the plaintiff, and a rule for a new trial. The plaintiff having afterwards discontinued, was held liable to the costs of the former trial, expressly on the authority of *Jackson v. Hallam*.

Before this last case, another had occurred, which ought not to be overlooked. In *Gray v. Cox*, the plaintiff had a verdict, a new trial ordered, nothing said about costs, and then there was a discontinuance. The Court said it was a rule that a party should never have the costs of a trial in which he had been defeated. That reasoning does not apply to this case. But they also said, that if the defendant had succeeded on the second, he would not have had the costs of the former trial, and that it was difficult to find a reason why the defendant should be in a better situation, because the plaintiff should not choose to have the cause tried a second time—an observation which certainly has a very important bearing on the present case.

The case of *Robertson v. Liddell (1)*, is indeed a case in which the plaintiff, who had failed on the first and succeeded on the second trial, was nevertheless held entitled to the costs of both; but that was entirely on the ground that the agreement of the parties had placed them on the same footing as if a special case had been reserved on the first trial.

The last decision on this subject is that of *De Rutzen v. Lloyd*, in which there was a verdict for the plaintiff, a rule for a new trial for misdirection, which was not drawn up by the defendant, but having been drawn up and served by the plaintiff, the defendant disclaimed the privilege of a new trial, and the Court, though not without much hesitation and doubt on the

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part of some of its members, allowed the plaintiff the costs of the first trial, expressly on the ground that the defendant had abandoned the rule for a new trial, and was in the same situation as if there had been no rule at all. The former verdict therefore stood, and the only mode by which the plaintiff could recover the fruits of his action, was by a judgment founded on that verdict, which would, of course, include the costs of obtaining it. It by no means follows that the Court would have been of the opinion that these costs were recoverable, if, after drawing up and serving the rule, the defendant had obtained an order to strike out his pleas and had suffered judgment; indeed, the very recent case of *Peacock v. Harris* shews they would not.

Before this case, another had occurred in this Court, which is against the claim for the former costs. The case is that of *Porter v. Cooper*, in which a writ of inquiry was set aside for a mistake of the Under-sheriff, and the defendant having then paid the debt, the Court decided that he was not bound to pay the costs of the former trial; and Lord Abinger said that the plaintiff was not in a worse situation than if he had gone down to a second trial, and recovered the same amount of damages.

In this state of the authorities, we think we are not bound by that of *Sweeting v. Halse*; and we decide against the application in this case, on the ground that neither party was entitled to the costs of the first abortive trial in the first instance, and that the plaintiff, by discontinuing, has not made himself so. This step, we think, he ought to be permitted to take, by which he may save the defendant the trouble and extra costs of a new trial by proviso; and yet which places him just in the same situation as if the trial had been had, as to the prior costs; and therefore the rule must be discharged.

Rule discharged.

END OF MICHAELMAS TERM.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF EXCHEQUER,

IN

Hilary Term, 2 Victoria, 1839.

HALLIFAX, Clerk, v. CHAMBERS and PATTINSON.

Eschequer.

CASE. The declaration stated, that whereas the defendants were tenants to the plaintiff, of a messuage, farm, and lands, and by reason thereof, it was the duty of the defendants to manage and use the lands in a husband-like manner, according to the custom of the country; yet the defendants did not manage and use the lands in a husband-like manner, according to the custom of the country. The particulars of the mismanagement were set out.

Pleas: first, Not Guilty.

Second, that the defendants were not tenants modo et formâ.

At the trial, before *Williams, J.*, at the *Carlisle* Summer Assizes, 1838, it appeared, that one *Thomas Chambers* had taken the lands in question, under a lease, from the plaintiff, which expired in *February*, 1836, and had allowed one *Willis* to occupy them until the death of *Thomas Chambers*, in 1835. The defendants, who were executors of *Thomas Chambers*, had permitted *Willis* to continue in possession until *February*, 1837. They had also paid rent to the plaintiff, and, at his request, had delivered to *Willis* a notice to quit, in which they stated themselves to be tenants of the plaintiff. It was objected, by the counsel for the defendants, that the plaintiff was bound to prove that the defendants had not managed the farm in an husband-like manner, and according to the custom of the country, and that for this purpose it was incumbent on him to produce the lease granted to *Thomas Chambers*, as the defendants must be considered to be holding over under the terms of that lease. The plaintiff having failed to give such evidence, and to produce the lease, the defendants' counsel contended that he ought to be nonsuited. The learned judge refused to nonsuit, and the jury having found a verdict

The declaration stated, that whereas the defendants were tenants to the plaintiff of a farm and lands, and by reason thereof it was their duty to manage and use the lands in an husband-like manner, according to the custom of the country; yet the defendants did not manage and use the lands in an husband-like manner, &c. The defendants pleaded, first, Not guilty; secondly, *non tenentur modo et formâ*:

Held, that under the latter issue, the tenancy alone was denied, and that the plaintiff was not bound to prove that the de-

fendants had not used the lands in an husband-like manner, and according to the custom of the country.

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for the plaintiff, with damages 20*l.*, the defendants obtained leave to move to enter a nonsuit, if the Court should be of opinion that the plaintiff was bound to produce such evidence. A rule *nisi* having been obtained accordingly,

Creswell, with whom was *Armstrong*, shewed cause, and was stopped by the Court, who called upon

W. H. Watson, in support of the rule.—On the issue raised by the plea of *non tenerunt modo et formā*, it was incumbent on the plaintiff to prove that the defendants were tenants on the terms stated in the declaration, namely, that they were bound to manage and use the lands in an husband-like manner, and according to the custom of the country. And, the plaintiff having omitted to produce such proof, a nonsuit ought to be entered. He cited *Legh v. Hewitt (a)*, *Hutton v. Warren (b)*.

LORD ABINGER, C. J.—The argument advanced, on behalf of the defendants, cannot be supported, unless we were to lay it down, as a proposition of law, that an obligation to farm according to the custom of the country, arises from the mere relation of landlord and tenant. This rule must be discharged.

PARKE, B.—I am of the same opinion. The terms of the tenancy are not included in the issue raised by the defendants. The words in the declaration, “By reason thereof it was the duty of the defendants, &c.,” are either matter of law, and, therefore, incapable of being traversed, or they are matter of contract, distinct from the tenancy, and, therefore, ought to be made the subject of a distinct traverse. The defendants have denied the tenancy; but they have not denied the fact which is alleged in the declaration to be a consequence of the tenancy. Perhaps the safer way of framing a declaration of this kind would have been, to aver that the defendants became tenants upon the terms of using the land in an husband-like manner, and according to the custom of the country.

GURNEY, B.—The issue taken by the defendants denies the tenancy; and that fact was proved by the payment of rent, and the defendants’ notice to quit, in which they call themselves tenants to the plaintiff.

Rule discharged.

(a) 4 East, 154.

(b) 1 Moo. & W. 466; 2 Gale, 71.

MONKS v. DYKE and others.

A plea, justifying an assault committed in removing the plaintiff from the defendant’s dwelling-house, because he was making a disturbance there, is not supported by proof of an assault in a room which the defendant occupied as a lodger, the plaintiff being his landlord, and residing in the house.

TRESPASS for assault and battery.—*Plea*: That the defendant was in possession of a dwelling-house, and the plaintiff was unlawfully in the said dwelling-house, making a great noise and disturbance therein, where-

by reason thereof, the plaintiff was assaulted by the defendant, and the plaintiff was removed from the dwelling-house, because he was making a disturbance there, is not supported by proof of an assault in a room which the defendant occupied as a lodger, the plaintiff being his landlord, and residing in the house.

upon the defendant attempted to remove him, and in so doing, necessarily and unavoidably committed the supposed trespass. *Replication: de injuriâ*.—At the trial, before *Parke, B.*, at the *Bristol Summer Assizes, 1838*, it appeared that the defendant, *Dyke*, who was tenant to the plaintiff, occupied two rooms in the house where the assault was committed, and that the plaintiff, the landlord, also lived in the same house. The counsel for the plaintiff, objected that the plea was not supported, as the place where the assault was committed, could not be considered the dwelling-house of the defendant. The learned judge being of opinion, on the authority of *Fenn v. Grafton (a)*, that the plea was supported by the evidence, the plaintiff was nonsuited, with leave to move to enter a verdict for 1*s.*, if the Court should be of opinion that the nonsuit was improper. *Erle* having obtained a rule accordingly,

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Crowder shewed cause.—The plea was substantially proved; for it was shown that the defendant was in possession of part of the dwelling-house; and a precise description of the premises is not necessary. In *Fenn v. Grafton*, it was held that the plaintiff, who had the separate use and occupation of the first floor, and some other parts of the house, might describe himself as lawfully possessed of a dwelling-house. If the plea in this case had stated that the defendant was in possession of three apartments, proof that he was in possession of one only, would have been sufficient.—[*Lord Abinger, C. B.*—A statement that a party is in possession of a dwelling-house, is not equivalent to a statement of a possession of several rooms.]—There is in this case a legal identity between the statement in the declaration, and the facts proved at the trial, and that is sufficient. *Starkie on Evidence*, vol. 1, 373-4, 2d. ed. The plaintiff could not have been misled.

Erle, contra, was not called upon by the Court.

LORD ABINGER, C. B.—The replication puts the whole plea in issue, and the averment that the defendant was possessed of a dwelling-house, is a substantial part of the plea. That averment is not sustained by proof that the defendant was in possession of part only of the dwelling-house. According to the argument of *Mr. Crowder*, if he were in possession of a single brick, he might describe himself as in possession of a dwelling-house. The rule for setting aside the nonsuit, must be made absolute.

PARKE, B.—The plea in this case was not proved, for the defendant should have shown such an occupation as would have enabled him to maintain an action of trespass for an invasion of his dwelling-house. It appeared at the trial, that the defendant was a lodger, which is a different thing in substance from his being in possession of a dwelling-house. He ought to have stated the fact correctly, as a mis-statement might have misled the plaintiff. I should have acted upon this opinion at the trial, but for the case of *Fenn v. Grafton*, which at that time appeared to me to be an authority the other way. Now, however, I think that case is not in favour of the defendant. All that it decides is, that a dwelling-house and a messuage are in some

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respects the same, and that if rooms constitute a dwelling-house they may be described as a messuage. And without doubt that is the case. If the occupation of the defendant, in this case, had resembled that of the plaintiff, in *Fenn v. Grafton*, he might have been described as in possession of a dwelling-house. But that is not the case, and therefore the plea was not supported.

CURNEY, B., concurred.

Rule absolute (b).

(b) *Alderson*, B., was absent.

HANSBY v. EVANS.

Where a cause was ready to be tried, but was withdrawn at the time of trial upon an agreement of reference, which was never signed, and no reference ever took place; the Court refused to give judgment as in case of a nonsuit, on the ground that the plaintiff having taken the cause down for trial once, was not in default, and that the defendant's course was to take down the record by proviso.

DEEDES moved for judgment as in case of a nonsuit for not proceeding to trial. Notice of trial, before the sheriff, was given for the first of *February*, at which time both parties attended, when upon a reference being proposed by the plaintiff, the cause was withdrawn. The agreement for the reference however was never signed, though a draft agreement, prepared by the plaintiff, was on the 9th of *November* sent to the defendant to be settled, and was by him returned to the plaintiff accordingly. No reference took place.

Per Curiam (a).—No instance can be found of judgment, as in case of a nonsuit, after a cause has been once taken down for trial. Here the plaintiff was ready to proceed to trial. When it was agreed that the cause should be referred to arbitration, that was in effect the same as if the cause had been made a remanet at *Nisi Prius*. We cannot say that the plaintiff has been guilty of any default in not proceeding to trial. The defendant was wrong in allowing the cause to be withdrawn on an imperfect agreement of reference, and his course now is, to take down the record by proviso. The case of *Godfrey v. Wade* (b), appears to be an authority in point.

Rule refused (c).

(a) Lord Abinger, C. B., Parke and Alderson, Ba.

(b) 6 B. Moore, 438.

(c) See *Newburn v. Langley*, 3 Term Rep. 1; *King v. Pippett*, 1 T. Rep. 492, S. P.; 2 Tidd. Prac. 763, 9 edit.

EAST v. PELL.

Eschequer.

COVENANT on an indenture of apprenticeship.—The declaration stated, that one *John Pell*, with the consent of his father, the defendant, put himself apprentice to the plaintiff, and that in consideration of 15*l.*, to be paid by the defendant at, or before the execution of the indenture, and of the further sum of 15*l.*, to be paid by the defendant, on the 16th day of *December*, 1837, he, the plaintiff, covenanted to instruct and maintain the apprentice. That the apprentice entered into, and continued in the service of the plaintiff after the 16th of *December*, 1837. The breach assigned was, the non-payment of the sum of 15*l.*

Justices at Quarter Sessions, on discharging an apprentice from his indentures, are not empowered by the Stat. 5 Eliz. c. 4, s. 35, to award restitution of any part of the premium.

Plea.—That from the time of making the indenture, until the 14th of *October*, 1837, the plaintiff neglected to instruct the apprentice, and had beat, and otherwise ill used him. That the apprentice thereupon complained to a justice of the peace, who summoned the plaintiff to appear before him. That the plaintiff would not consent to allow the justice to compound the matter of complaint, according to the Statute, and that he was therefore bound by recognizance to appear at the next General Sessions of the Peace, to answer the complaint of the apprentice. That the plaintiff appeared accordingly at the General Sessions. That the justices there ordered the apprentice to be discharged from his apprenticeship, and also ordered that no part of the sum of 15*l.*, which was payable to the plaintiff on the 16th of *December*, 1837, should be paid.

Demurrer and joinder.

The points marked for argument on the part of the plaintiff were, that the Court of Quarter Sessions had no authority to make that part of their order which directed that no part of the sum of 15*l.*, which became due from the defendant to the plaintiff, on the 16th of *December*, 1837, should be paid by the defendant to the plaintiff.

Waddington, in support of the demurrer.—The justices had no authority to make an order, that the remainder of the premium should not be paid to the plaintiff. The question turns upon the construction of 5 *Eliz.* c. 4, s. 35 (*a*).

(*a*) "And if any such master shall misuse or evil intreat his apprentice, or that the said apprentice shall have any just cause to complain, or the apprentice do not his duty to his master, then the said master or apprentice being grieved and having cause to complain, shall repair unto one justice of the peace within the said county, or to the mayor or other head officer of the city, town corporate, market town, or other place where the said master dwelleth, who shall by his wisdom and discretion take such order and direction between the said master and his apprentice, as the equity of the cause shall require; and if for want of good conformity in the said

master, the said justice of peace, or the said mayor or other head officer, cannot compound and agree the matter between him and his apprentice, then the said justice, or the said mayor or other head officer, shall take bond of the said master to appear at the next Sessions then to be holden in the said county, or within the said city, town corporate, or market town, to be before the justices of the said county, or the mayor or head officer of the said town corporate or market town, if the said master dwell within any such; and upon his appearance and hearing of the matter before the said justices, or the said mayor or other head officer, if it be thought meet unto them

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It is true, that in *Dillon's Case* (b), and *The King v. Johnson* (c), it was held, that justices in Quarter Sessions, might order restitution of the apprentice fee; but those cases have been over-ruled by *Rex v. Vandeleer* (d), and *Rex v. Amies* (e): *Hawkesworth* and *Hillary's Case* (f), will also be relied on by the defendant. The Statute of *Geo. 4*, c. 29, ss. 1 & 2, enacts, that where the apprentice fee does not exceed 25*l.*, and the apprentice is ordered to be discharged, two justices may order the whole, or any part of the premium to be refunded. There is therefore a legislative declaration, that independently of that Act, justices had no power to order the apprentice fee to be returned. The magistrates, in this case, have assumed the authority of a court of equity, and have, in fact, declared that the plaintiff shall not bring any action against the defendant, or that he shall bring it for a certain sum only. The plaintiff however would still be liable to the defendant, upon the covenant, and could not plead the discharge of the apprentice as a bar to the action. The defendant must seek relief in equity, and that affords an answer to the alleged necessity of the interference of the justices.

Peacock, contra—All the earlier, and some of the later decisions are in favour of the right of the justices to order the premium to be returned. The Statute of 5 *Eliz.* c. 4, gives an equitable jurisdiction to magistrates; it places them in the situation of arbitrators; but its objects could not be fulfilled, unless it were held that the justices had the power of ordering the premium to be restored. And if they have the power of awarding restitution, they must also have authority to determine whether any, and what sum is to be paid to the master.

LORD ABINGER, C. B.—If the authorities on the present question had been uniformly in favour of the right of justices to order restitution of the apprentice fee, I should have felt disposed to be bound by them; but the Statute has received different constructions; and *The King v. Vandeleer*, which is the best authority, and was decided in full Court, determines that the justices have no such power; and since that decision there are no cases which assert the existence of such a power. There is some force in the argument of Mr. *Waddington*, that we ought not to overlook the legislative exposition,

to discharge the said apprentice of his apprenticeship, and then the said justices, or four of them at the least, whereof one to be of the *quorum*, or the said mayor or other head officer, with the assent of three other of his brethren, or men of best reputation within the said city, town corporate, or market town, shall have power, by authority hereof in writing under their hands and seals, to pronounce and declare that they have discharged the said apprentice of his apprenticeship; and the cause thereof, and the said writing so being made and inrolled by the clerk of the peace or town clerk, amongst the records that he keepeth, shall be a sufficient discharge for the said apprentice against his mas-

ter, his executors and administrators; the indenture of the said apprenticeship, or any law or custom to the contrary notwithstanding; and if the default shall be found to be in the apprentice, then the said justices, or the said mayor or other head officer, with the assistance aforesaid, shall cause such due correction and punishment to be ministered unto him, as by their wisdom and discretions shall be thought meet."

(b) 1 Salk. 66.

(c) *Ib.* 67.

(d) 1 Stra. 69.

(e) 1 Bott, p. 515, pl. 731; *Bac. Abz.* "Master and Servant," 550; 1 *Barr.* "Apprentice," 73, 13th edit.

(f) 1 Wms. Saund. 312, a.

that the Act of *Elizabeth* has received from the 4 *Geo.* 4, c. 28. On the whole, I am of opinion that the true construction of the Statute is, that although the justices might put an end to the apprenticeship, yet they could not award restitution of the premium. The plea is therefore bad, and our judgment must be for the plaintiff.

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PARKER, B.—I am of the same opinion; if the matter were *res integra*, there could be no doubt as to the construction of the Statute of *Elizabeth*. The parties are to go before one justice, who is to take such order between them, as the equity of the case may require; and if the master refuses compliance, then the justices, at Quarter Sessions, have power to dissolve the indentures. That is all that the Statute of *Elizabeth* authorizes. It does not follow from that, that the justices have the power to take away the premium; for such an act, where the premium is large, would be a very severe punishment. The one power is not incidental to the other, but goes far beyond it. The authorities on the point are conflicting. In the case cited from *Salkeld, Rex v. Johnson*, the judgment of Lord Holt is given in a short and incidental manner. But in *Rex v. Vandeleer*, the judgment was delivered after argument, before the full Court. Then came *The King v. Amies*, where *Rex v. Vandeleer*, was not cited. These decisions are so conflicting, that we do not feel ourselves bound by them. We must construe the Act as we would construe a modern Statute, and then the true interpretation will be, that the magistrates have power to dissolve the apprenticeship, but not to order restitution of the premium. As to the opinion of the legislature, supposed to be conveyed in the Statutes of 20th *Geo.* 2, and 4th *Geo.* 4, I do not place much reliance upon that argument; for we may conceive the object of the Statute of *Geo.* 2, to have been to extend to two magistrates, the jurisdiction which previously could have been exercised by four only.

ALDERSON, B.—If the course of decisions had been uniform, I should have been inclined to bow to it. But the decisions point different ways, and in the last case, *The King v. Amies*, we have only the opinion of a single judge. Let us consider the objects of the Statute of *Elizabeth*. That Statute does not seem to apply to the case of an apprentice with whom a premium has been paid. It gives power to a master to compel a party to become his apprentice, and it then authorizes the justices to determine between the apprentice and the master, who has so forced him into his service. There has therefore, been no omission on the part of the framers of the Statute, because the Statute applied not to the case of an apprentice with whom a premium is paid, but to one who is bound, compulsorily.

Judgment for the plaintiff.

Exchequer.

**LEARMONTH, Assignee of WHITE, an Insolvent Debtor, and
surviving Partner of ATTWOOD, v. GRANDIN.**

To an action by an assignee of an insolvent for money had and received, the defendant pleaded that the insolvent and his partner were indebted to the defendant in 451*l.* 18*s.* for money lent, money paid, and interest, and that an account was stated between them concerning this sum; that the defendant set-off and allowed to the insolvents the said sum, and exonerated and discharged them from the payment thereof in full satisfaction and discharge of the promises in the first and second counts as to the said sum, which set-off and allowance the insolvents accepted in full satisfaction and discharge. Replication, that the insolvents were not indebted to the defendant in manner and form, &c. : *Held*, that the replication was good; for that the plaintiff, by traversing the debt, had in fact traversed the account stated.

ASSUMPSIT. The declaration stated that heretofore, &c., the defendant was indebted to *White* and *Attwood* in 600*l.*, for money received by him for their use, and on an account stated.

Third plea. As to the 451*l.* 18*s.*, parcel, &c.; that after making the promises, &c., the said *White* and *Attwood* were indebted to the defendant for money lent, money paid, money received to the use of the defendant, and for interest. That an account was then had and stated between the said *White* and the defendant, of and concerning the monies in this plea mentioned, and concerning the said sum of 451*l.* 18*s.*, parcel, &c., and the defendant then set off and allowed to the said *White* and *Attwood*, the said sum of 451*l.* 18*s.*, parcel, &c., out of the monies so due to the defendant, as in this plea mentioned, and then exonerated and discharged the said *White* and *Attwood*, from the payment of 451*l.* 18*s.*, parcel, &c., of the monies so due from the said *White* and *Attwood* to the defendant, in full satisfaction and discharge of the premises in the 1st and 2d counts mentioned, as to the said sum of 451*l.* 18*s.*, parcel, &c., and of all damages by the said *White* and *Attwood* sustained, by reason of the non-performance thereof, which same set-off and allowance the said *White* and *Attwood* accepted and received, of and from the defendant, in full satisfaction and discharge as aforesaid.

Verification.

Replication to the third plea, that *White* and *Attwood* were not indebted to the plaintiff in manner and form, &c.

Special Demurrer for the following, among other causes: that the traverse taken by the said replication is not of the material and substantial part of the defence stated in the said last plea; but on the contrary, the allegation traversed by the said last plea, is merely stated therein by way of inducement to the defence pleaded in and by the said last plea; and also for that the gist and substance of the said last plea is, that the sum of 451*l.* 18*s.*, parcel, &c., was and is discharged and satisfied in the manner stated and set forth in the said last plea; and the said replication does not traverse or deny that the said sum of 451*l.* 18*s.*, was discharged and satisfied, as in the said last plea mentioned, but on the contrary admits the same to be true; and also for that the said replication denies merely the consideration for the said satisfaction, which being executed cannot be denied, except as part of the said satisfaction, and so far as the same is material to the said satisfaction also for that the replication is ambiguous, and argumentative, and uncertain; also for that the plaintiff shews no special cause why he should be allowed to open accounts admitted by the replication to have been settled.

Butt, in support of the demurrer, cited *Smith v. Hitchcock* (a), *Lampleigh v. Brathwait* (b), *Young v. Rudd* (c), *Lawes v. Eastmure* (d).

(a) Cro. Eliz. 201.
(b) Hob 106.

(c) 5 Mod. 86.
(d) 8 Car. & P. 205.

Knowles, contra, was not called upon by the Court.

Per Curiam (e).—The replication is good. The plea states an agreement to set off a joint existing debt. The plaintiff traverses the existence of the debt, and thereby denies the agreement. For if there was no such debt, there could be no such agreement. He has in fact traversed the account stated. If he had done so in terms, the defendant would have contended that he had admitted the joint debt. This is in substance, a traverse of the entire plea. There was a case argued before us in this Term, by Mr. *Erle (f)*, where the plea stated that certain flour had been agreed to be delivered by the defendant to the plaintiff, and had been received by the latter by way of accord and satisfaction; the plaintiff traversed the agreement to deliver: and we held the replication good, because unless there had been an agreement to deliver, there could be no accord and satisfaction. This is a tricky plea, and the plaintiff has taken the best mode of answering it. The defendant may have a week to amend his plea, and if he does not take that course, there will be judgment for the plaintiff.

Plea to be amended, otherwise judgment for the plaintiff (*g*).

(*e*) Lord *Abinger*, C. B., *Parke*, and *Gurney*, B.

(*f*) *Gray v. Shepherd*.

(*g*) See *Kinnerley v. Hossack*, 2 Taunt. 170; *Wood v. Butts*, Cro. Eliz. 260; *Jones v. Roberts*, 2 Cr. & Mee. 219;

4 Tyr. 48; *Beaumont's Case*, Latch. 111; *Webb v. Weatherby*, 1 Bing. N. C. 502; 1 Hodges, 39; S. C. 1 Scott, 477; *Gledstane v. Hewett*, 1 Cr. & Jer. 565; 1 Tyr. 445; *Walker v. Jones*, 2 Cr. & Mee. 672; 4 Tyr. 915.

LEWIS v. DAVISON.

ASSUMPSIT. The declaration stated, that whereas before and at the time of making the promise of the defendant thereafter mentioned, *James Davison* was indebted to the plaintiff in 280*l.*, and that the plaintiff had commenced an action against the said *James Davison* for the recovery thereof, which action was pending at the time of the promise of the defendant, and thereupon in consideration that the plaintiff, at the request of the defendant, would accept from *James Davison*, 30*l.* in cash, and ten promissory notes, each for the payment of 25*l.*, payable at certain periods, on account of the sum of 280*l.*, and in lieu and discharge of the said action, and would forbear and give days of payment to the said *James Davison*, of the several sums of 25*l.* respectively, until the said several promissory notes respectively should become due as aforesaid, the defendant promised the plaintiff that if any of the said notes should be returned dishonoured, and remain unpaid for three days after either of them should become due, and if the plaintiff should issue a writ of *capias*, or detainer, on either of the said promissory notes, that the defendant

The declaration stated, that in consideration that the plaintiff would forbear to sue *J. D.*, and would receive from him certain promissory notes, the defendant undertook that if the notes should be dishonoured, and the plaintiff should issue a writ of *capias* or detainer against *J. D.* in respect of them, he would surrender *J. D.* into the custody

of the sheriff of *Middlesex*, or some other county, so that he might be arrested or detained on such writ, or in default thereof, that he, the defendant, would pay the plaintiff the amount of the notes.

Held, that this was a legal contract.

The declaration averred that the plaintiff received from *J. D.* ten notes, drawn and indorsed by *J. D.*

Held, that it was unnecessary to state that the notes were indorsed by *J. D.* to the plaintiff.

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would surrender and deliver up into the custody of the sheriff of *Middlesex*, or sheriff of some other county in *England*, the marshal of the *Queen's Bench*, or warden of the *Fleet*, the body of the said *James Davison*, so that the said *James Davison*, might be arrested or detained on such writ of *capias* or detainer; and that in default of so doing, he the defendant would pay the plaintiff the amount of any or either of the said promissory notes, as they should become due. *Averment*, that the plaintiff received 30*l.* from *James Davison*, and ten promissory notes, drawn and indorsed by *James Davison*, each for the payment of 25*l.*, that he did forbear and give days of payment to *James Davison*; that one of the said promissory notes became due, and was presented to *James Davison* for payment, but *James Davison* did not pay it, and that it was returned to the plaintiff dishonoured; that the plaintiff then, and from thence hitherto, being the holder of the said note, the same having remained unpaid for three days after it became due, the plaintiff sued out a writ of *capias* in respect of the said note, and delivered it to the Sheriff of *Middlesex*, of all which the defendant had notice; that the defendant was then requested to deliver up the body of the said *James Davison*, that he might be arrested under the said writ. *Breach*, that the defendant did not deliver the body of *James Davison* into the custody of the said Sheriff, and that neither the defendant nor the said *James Davison* paid the amount of the said promissory note, and that the same still remained unpaid.

Demurrer and joinder.

The grounds of demurrer were, *first*, that it appeared by the declaration, that the contract declared on was for the delivering up by the defendant of the body of *James Davison*, and that it nowhere appeared that the said contract was entered into with the privity of the said *James Davison*, that it was therefore an unlawful contract, and not binding on the defendant on any respect.

Second, that it was not alleged in the declaration that the promissory note, mentioned to be drawn and indorsed by *James Davison*, for the payment of 25*l.*, was drawn and indorsed payable to the plaintiff, and that it did not appear that the plaintiff had any right of suit thereon against the said *James Davison*.

G. T. White, in support of the demurrer.—The declaration does not state any consideration for the forbearance of the plaintiff to sue *James Davison*, for it does not appear that the latter was liable upon the notes, as they are not stated to have been indorsed by him to the plaintiff. He may have made them payable to himself.—[Lord *Abinger*, C. B.—Such an instrument drawn by a party, and made payable to himself, is not a promissory note; it becomes so only when it is indorsed over.]—*Jones v. Ashburham (a)*, is in point.

Secondly, this contract is illegal; for as it is not stated that *James Davison* consented to be delivered up, it is an agreement to do that which may lead to a breach of the peace, and resembles the case of *Allen v. Rescous (b)*, where a promise in consideration of the plaintiff's beating another, was held to be void. Such a promise, however, might have been sustained, if the party

(a) 4 East, 455.

(b) 2 Lev. 174.

had consented to be beaten, *Lowe v. Peers* (c), *Prat v. Phanner* (d), *Morris v. Chapman* (e), *Conn. Dig.* "Condition" D. 7.—[*Parke, B.*—If a man gives another a licence to beat him, such licence is void.—*Alderson, B.*—This agreement is not necessarily illegal; it may be an agreement by the defendant to arrest *James Davison* for a debt of his own, and thereby enable the plaintiff to lodge a detainer against him.—*Parke, B.*—This agreement is in the alternative, and the true construction of it is, that the defendant will arrest *James Davison* by lawful means, or pay the amount of the promissory note.]—This agreement is illegal in another respect, as it binds the defendant to arrest *James Davison* in a county where he does not reside.

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Humfrey, contra, was not called upon by the Court.

LORD ABINGER, C. B.—I assent to the general proposition, that an agreement to do an unlawful act, cannot be the foundation of an action; but when a man contracts to do that which may be lawful or unlawful, according to circumstances, the inference is that he contracts to do what is lawful. And, if the agreement is in the alternative, either to do the act or pay a certain sum, the fair construction is, that he agrees to do that which is lawful or pay that sum. In the present case, *James Davison* could be arrested only by due process of law, or by his own consent; and if the defendant could not arrest him by either of these means, he would have been bound to pay the money. The contract, therefore, is good, and our judgment must be for the plaintiff.

PARKE, B.—The Court will not intend this contract to be illegal. It does not resemble a contract to beat another. The defendant has in fact stipulated that he will cause *James Davison* to be surrendered to any sheriff, who is ordered by the plaintiff to arrest him; that is to say, that he will induce *James Davison* to consent to be arrested, or that he will pay the money due upon the notes.

ALDERSON, B.—If this contract may be considered legal, the Court should put that construction upon it (f).

Judgment for the plaintiff (g).

(c) 4 Burr. 2225.

(d) Moor, 477.

(e) Sir T. Jones, 24.

(f) *Gurney, B.*, was absent.

(g) See *Stevens v. Webb*, 7 Car. & Pa. 60.

WATSON v. CARROLL and another.

CASE. The declaration stated, that at the time of committing the grievances, &c., the plaintiff was a practising barrister, and the defendants were sheriff of *Middlesex*. That the plaintiff, on the 10th August, 1838,

A practising barrister was arrested on *meane* process, on returning

from Court to his chambers, there being at the time three writs of *ca. sa.* against him at the sheriff's office. He thereupon applied to a judge for his discharge, on the ground of his having been arrested while privileged, but made no application to be discharged in respect of the writs of *ca. sa.* The judge having ordered him to be discharged, the sheriff detained him in custody on the writs of *ca. sa.*: *Held*, that the sheriff was justified in so doing.

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was present in, and attending, the Court of *Chancery*, for the purpose of being heard as counsel for a defendant in a certain suit; that after attending such Court, he was returning to his chambers, and that the defendants, whilst he was so returning, arrested him by virtue of a *capias ad respondendum*. That, on the 11th *August*, he was, by order of a judge, directed to be discharged out of custody, on the ground of his being a practising barrister, and therefore privileged from arrest in returning from Court to his chambers. *Breach*, that the defendants refused to discharge him, but wrongfully, and against his will, detained him in prison for a long space of time, &c.

Plea: that before the arrest mentioned in the declaration, one *W. B.*, had sued out a writ of *ca. sa.* against the plaintiff, directed to the defendants, and that before the return of the *ca. sa.*, and before the execution of it, the defendants, without the privity or interference of the said *W. B.*, arrested the plaintiff, under the writ of *capias ad respondendum* in the declaration mentioned, and thereupon held and detained the plaintiff in their custody, as well under the said writ of *ca. sa.*, as under the said writ of *capias ad respondendum*, until they received notice of the judge's order; and that after receiving notice of such order, the defendants detained the plaintiff in their custody, by virtue of the writ of *ca. sa.*, the plaintiff not having been duly discharged therefrom during all the time aforesaid. *Verification*.

There were two other pleas similar to the above, stating the issuing of two other writs of *ca. sa.* at the suit of two other persons.

Special demurrer and joinder.

The causes assigned were, that the pleas were no answer to the declaration, as the plaintiff sought to recover damages for the malicious keeping and detaining of the body of the plaintiff after notice of the order for the plaintiff's discharge, and with full knowledge, by the defendants, that the plaintiff had been arrested when he was privileged from arrest, and also with full knowledge that the order for the plaintiff's discharge had been made on the ground of his having been so privileged from arrest, that the keeping and detaining of the plaintiff's body, with full notice of all the circumstances, was wrongful and malicious, and that it was the duty of the defendants, after receiving notice of the judge's order, and of the ground on which it had been made, to discharge the plaintiff from their custody, notwithstanding their being in possession of the said writs of *ca. sa.*

The points for argument, on the part of the defendants, were, that the action, if any would lie, should have been brought in trespass, and that no action would lie upon a judge's order, but that all proceedings upon it ought to be by attachment, after the order had been made a rule of Court.

Stammers, in support of the demurrer.—It has never been expressly decided that an action on the case can be maintained under circumstances similar to the present; but the inclination of judges has been to consider this form of action proper, where the sheriff has been guilty of oppressive conduct. That inference may be drawn from the language of Lord *Mansfield*, in *Tarlton v. Fisher* (a). The same doctrine seems to be approved, by Lord *Lyndhurst*, in *Stokes v. White* (b).—[Lord *Abinger*, C. B.—If the sheriff permits the escape of a party who is privileged, but does not take advantage

(a) Doug. 646.

(b) 1 C. M. & Ros. 223; 4 Tyr. 786

of his privilege, is he not liable to an action for an escape?—The prisoner was entitled to his discharge, as well as from the writs of *ca. sa.* as from the writ of *mesne process*. It was the duty of the sheriff to respect the plaintiff's privilege as soon as they became aware of it.—[*Parke, B.*—It does not appear that he requested to be discharged; he may have wished to be taken in execution, in order to protect his goods.]—The declaration states, that the defendants wrongfully, and against the will of the plaintiff, kept and detained him in custody.—[*Alderson, B.*—It does not follow that the plaintiff expressed his will.]—He cited *Sharplin v. Hunter (c)*, and *Spence v. Stuart (d)*.

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Kennedy, contra, was not called on by the Court.

LORD ABINGER, C. B.—The plaintiff has failed to prove any oppression in this case. The sheriff is in possession of a writ, under which he is justified in detaining the plaintiff. Then if, upon his own authority, he undertakes to discharge him, how can he defend himself in an action for an escape. If, indeed, the sheriff had concealed from the plaintiff the existence of other executions, the case might have been different; because then the plaintiff might have urged that he had been prevented, by the sheriff, from obtaining his discharge from those executions. But if the plaintiff had applied for his discharge from the other writs, the plaintiffs in those cases might have been able to show that he was not entitled to his discharge, in respect of those suits.

PARKE, B.—I think this action cannot be maintained, even though it were conceded that an action of this kind would lie against a party who, being aware of another's privilege, oppressively arrests and detains him. Here it appears, that the plaintiff was arrested on his return from chambers, and that a judge's order was obtained for his discharge. No action could be brought on this order, and it is used only as constituting notice to the sheriff of the plaintiff's being entitled to his discharge, on the ground that such was the opinion of the learned judge. But is the sheriff in this case bound to act upon it? Other writs of *ca. sa.* against this plaintiff, are lying in the sheriff's office at the time of the arrest; the plaintiff is therefore, in execution on those writs, and the sheriff could not discharge him without subjecting himself to an action for an escape. It is true the sheriff has notice of the plaintiff's privilege; but he has no notice of his applying for his discharge from the writs of *ca. sa.* The plaintiff may wish, for reasons of his own, to be in custody on those writs. But he is entitled to his privilege only when he avails himself of it, and then the sheriff must have notice of it. I think, therefore, that the sheriff has not been guilty of oppression.

ALDERSON, B.—The privilege of the plaintiff may, perhaps, have extended to all the writs of *ca. sa.*; but he has been discharged as to one cause of action only. If the rule were, that the sheriff was bound to discharge him under circumstances like these, it would follow that a party arrested might state such facts to a judge as would procure his discharge; whereas, if the plaintiffs in other suits had had an opportunity of being heard, they could

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have stated other circumstances, as for instance, that the party went *extra viam*, which would shew that a discharge ought not to be granted. So that although a person may obtain an order for his discharge, as against one party, yet it is but just that other detaining creditors should be placed in a situation to prevent the judge from granting such order. The sheriff is, therefore, bound to keep the prisoner until he is discharged from the other executions, in order that other parties may not be deprived of the fruits of their writs of *ca. sa.*

Judgment for the defendants.

In re GLATTON Land-tax.

Certain property, situate in the parish of *H.*, was assessed to the land-tax in that parish. The tenant of this property being afterwards assessed in the parish of *G.* in respect of the same property, refused to pay, and being returned by the collector as a defaulter, three writs of *levari facias* issued to the sheriff, under which his goods were sold, and the proceeds ultimately paid over to the receiver-general. An application having been afterwards made to set aside the writs of *levari facias*, the Court discharged the rule.

ONE *Edward Smith* was the occupier of a farm, in the parish of *Holme*, in respect of which he was assessed to the land-tax in that parish. This assessment was paid by *Margetts*, the owner of the farm. *Edward Smith* was also assessed by the parish of *Glatton*, in respect of the same land in *Holme*, and having refused to pay, was, by the collector of *Glatton*, returned to the receiver-general, as a defaulter. Upon this, three writs of *levari facias* against his goods, issued to the sheriff of *Huntingdonshire*, who, having seized and sold the goods, paid the produce to the receiving inspector, who paid it over to the receiver general. A rule *nisi* having been obtained, calling upon the Attorney General to shew cause why these writs of *levari facias* should not be set aside,

Sir John Campbell, A. G., shewed cause.—This application is made too late. A certain proportion of the land-tax is laid upon each parish; *Glatton* has paid its proportion, and the sum, to which it was assessed, has been paid to the receiving inspector, and, by him, handed over to the receiver general. *Glatton*, therefore, is discharged. The crown has no interest in this matter, having received no greater amount than was due from the parish of *Glatton*. The only object of this proceeding is, to lay the foundation of an action against the sheriff.

Kelly, contra.—The argument of the Attorney General tends to establish this proposition, that when the crown, on an *ex parte* statement, issues writs of *levari facias*, the subject, whose goods are seized and sold, has no remedy. —[*Parks*, B.—The question is, whether an action may not be brought against the collector, whose wrongful act has occasioned a party to pay the assessment twice.]—An action would lie against the collector for distraining, but not for improperly inserting a name in a schedule. The Stat. 1 & 2 Vict. c. 58, s. 2, gives a remedy, in cases like the present; but that Act was not passed at the time of this assessment. The Court has power to order this money to be refunded, having the same authority over these writs of *levari facias*, as over the ordinary writs of summons and *capias*. The complainant has no other means of trying this question, than by an application to the Court. He would bring an action against the sheriff, if the crown would in-

struct the sheriff to put on the record, a plea, calculated to raise the present question.

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Land-tax.

LORD ABINGER, C. B.—We cannot grant this application. Admitting that the Statute has given no other remedy than that, which is now sought, it does not follow that the present applicant is entitled to any remedy that he may suggest. Whether he has any remedy or not, it is unnecessary to determine; it is enough to say that he is not entitled to this. The object of the present motion, is to set aside writs issued under the authority of an Act of Parliament. The money has been paid by Mr. *Margetts*. If he had come to this Court at an earlier period, to remove the hands of the sheriff, the case might have been different, although I do not say it would. Here the crown has taken the precise sum that is due, but has taken it from the wrong person; but the writ having been duly issued, I do not see how it can be set aside, especially as, in such an event, the crown would be without the means of redress. We cannot, therefore, adopt a course which is at variance with the principles of law, in order to enable a party to apply elsewhere with greater appearance of equity. Whether the crown would be induced to re-fund this money, we cannot say; but the crown is not bound by law to refund. The injury has arisen from the improper conduct of the collector, in assessing the property in two districts, and there ought to be some remedy against him. There is no ground for the present application, either at law or equity.

PARKE, B.—This is a case of great hardship; but the evil will not arise in future, as the Act 1 & 2 *Vict.* c. 58, has provided a remedy. We cannot set aside these writs to give the party grieved a right of action against the sheriff. Besides, the sheriff is protected. Nor can we set them aside with a view to place Mr. *Margetts* in a better situation in the event of his applying to the Lords of the Treasury. This rule ought not to be made absolute, unless it could be made the ground of an order on the Treasury to pay back the money. Whether the party injured ever had a remedy, it is unnecessary for us to decide, it being sufficient to say that he cannot have that which he now prays for.

GURNEY, B.—In these proceedings, the course prescribed by the Act of Parliament has been strictly followed. Mr. *Margetts* was apprized of the levy made by the sheriff; he might, therefore, have given notice to the sheriff not to pay the money to the crown, and have come to this Court for relief. But he has suffered the money to be paid; and the crown has taken no more than its quota. Suppose *Margetts* were to get back this money, it would then be necessary to make a re-assessment, and that would be manifestly unjust.

Rule discharged.

Exchequer.

DOE, dem. STOWELL v. BARNES.

The defendant was described in the consent-rule as *John Barnes*, and in the affidavit of service and of the execution of the power of attorney, as *John Barnes*. The Court granted an attachment against him for non-payment of costs, on the ground that the name was *idem sonans*.

HORN moved for an attachment against the sheriff for non-payment of costs, pursuant to the Master's allocatur. The costs were taxed upon the consent rule, and demanded under a power of attorney. In the consent rule, the defendant was described as *John Barnes*, whilst in the affidavit of service, and of the execution of the power of attorney, he was termed *John Barnes*.

Per Curiam.—You are entitled to a rule; the name is *idem sonans*
Rule absolute.

HOPKINS v. The Mayor, Aldermen, and Burgesses of the Borough of SWANSEA.

The declaration stated that the half of certain land, over which a corporation had a right of common, was vested in the corporation by Act of Parliament. That by a rule, order, and ordinance of the corporation, the land was ordered to be leased, and part of the rents to be divided annually, on the 2d November, among certain senior burgesses. That an annual sum was accordingly paid to the plaintiff as such burgess, previously to the passing of 5 & 6 W. 4, c. 76; but that since that time the defendants had refused to pay that sum to the plaintiff. *Plea*: that before the commencement of the suit, to wit, on November 2d, 1836, the defendants necessarily, and as they were legally required and bound to do, paid all the rents by them received from the said lands, together with and among other rents and sums of money, amounting to 2,000*l*., in satisfaction of debts then due and payable to divers persons from the defendants in their corporate capacity, out of the property of the borough, and amounting to 2,000*l*., and by law then payable in priority and preference to the payment of the twelve senior burgesses of the yearly sums mentioned to have been due to them on the 2d November.

DEBT.—The declaration stated, that the borough of *Swansea* was an ancient borough, and that before the passing of the Municipal Corporations' Act, the burgesses, in common hall assembled, had the disposition of all the estates, property, revenues, and income thereof. That by an Act of Parliament, passed in 1762, certain common-land, over which the corporation had a right of pasturage, was enclosed, and divided between the corporation and the Duke of *Beaufort*, the half thereof being vested in the corporation, in their corporate capacity, for ever. That the Act gave the burgesses power to make leases of the said lands. That in the year 1762, the burgesses of the borough, in common-hall assembled, did, in their body corporate, ordain, order, and constitute a certain rule, order, and ordinance, for leasing the land for long terms of years, at certain yearly rents, to such burgesses as were willing to take the same. That it was also agreed and

Held, first, that the rule and ordinance of the corporation was a bye-law, on which an action could be maintained.

Secondly, that the plea was bad, as it did not state that the debts were contracted before the passing of the 5 & 6 Will. 4, c. 76, so as to entitle the defendants, under the 32d section, to pay the creditors of the borough, to the prejudice of the plaintiff's claim.

Thirdly, that as the corporation could not, under the 5 & 6 Will. 4, c. 76, pay their creditors voluntarily, to the prejudice of the plaintiff's rights, that the plea ought to have stated, either that they were compelled by their creditors to pay their debts, or that the sums paid to creditors were a specific charge upon the land, from which the annual payments to the burgesses issued.

Scilicet, that the plea ought to have stated that there was no surplus annual income remaining, after payment of the interest due to creditors, the salaries of municipal officers, and other lawful expenses.

ordered, that 2*l.* of the rents, arising from such land, should be distributed yearly by the common attorneys of the borough, on every the second day of *November*, yearly, to wit, 8*l.* a year to two of the senior aldermen residing within the said borough, in equal proportions, and 16*l.* a year to eight of the senior burgesses, not being aldermen, who should reside within the borough, and that the aldermen and burgesses should attend the common attorneys, and demand and receive the same. That the land was leased accordingly. That in 1821, the burgesses made another order, by which they ordered that, the two senior aldermen having relinquished their right to 4*l.* each, the number of senior burgesses should be increased from eight to twelve, and that they should be paid the sum of 2*l.* each out of the sum theretofore payable to the senior aldermen. That in 1825, it was by another order ordered, that the annuities, directed in 1762, to be paid to the senior burgesses, should be increased from 2*l.* to 10*l.* each, per annum. The declaration then stated, that the said annual payments had been paid up to the passing of the Municipal Corporations' Act. That after the passing of that Act, to wit, on the second of *November*, 1836, the plaintiff had been for the period of one year, one of the twelve senior burgesses of the borough. And that the defendants had then received sufficient rents from the said land, so allotted under the said Act of Parliament as aforesaid, under and by virtue of the leases, made in pursuance of the said Act, and the said first mentioned rule, order, and ordinance, and which said yearly sums became due to the said twelve senior burgesses, on the said second of *November*, whereby and by reason of the premises, &c., the defendants ought to have paid to the plaintiff the sum of 10*l.* Averment; that the office of common attorney had been abolished by the Municipal Corporations' Act, and that the plaintiff requested the defendants to pay him the sum of 10*l.*, which they refused to do. To the damage, &c.

Plea: That before the commencement of the suit, to wit, on the second of *November*, 1836, they, the defendants, necessarily, and as they were legally required and bound to do, paid, distributed, and applied all the said rents by them received from the said lands, together with and among other rents and sums of money, and in the whole amounting to a large sum of money, to wit, the sum of 2,000*l.*, towards and in payment and satisfaction of certain lawful debts, then due and owing, and payable to divers persons, from and by the defendants in their corporate capacity, out of the property of the said borough, and amounting to a large sum, to wit, the sum of 2,000*l.*, and by law then payable, in priority and preference to the payment of the said twelve senior burgesses, or any of them, of the said yearly sums above mentioned, to have become due to them on the said second day of *November*, 1836, or any part thereof.

Replication: That before the commencement of the suit, to wit, on the second of *November*, 1836, a surplus annual income from the said rents, and from other property of the said borough, belonging to the defendants in their said corporate capacity, did remain to the defendants, wherewith to pay the annual sums before mentioned, after payment of the interest of all lawful debts chargeable on the lands, and allotted as aforesaid, together with the salaries of municipal officers, and all other lawful expences, which on the 5th of *June*, 1835, were defrayed out of, and chargeable on the same.

Special demurrer and joinder.

The following were assigned as causes of demurrer. That the replication

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does not sufficiently traverse, or confess and avoid the matters of the said plea. That the replication is ambiguous and argumentative; and also for that the same replication, if it be understood as denying the payment, distribution, and application, in the same plea mentioned, in manner and form as therein expressed, ought to have concluded to the country, whereas it concludes with a verification. And also for that, the same replication, if understood as admitting such payment, distribution and application, and as purporting to avoid the matters so admitted, by the matters stated in the same replication, does not sufficiently avoid the matters so admitted, and that the matters in the same replication alleged, as therein pleaded, are no answer in law to the defence disclosed in the same plea. And also, for that it is not in and by the same replication alleged, nor does not therein appear, that any such surplus as therein mentioned remained to the defendants at the time of the commencement of this suit.

The points for the plaintiff were, that the plea was bad, because the payments therein stated to have been made, ought not to have been made, to the prejudice of the plaintiff's claim, by reason of the Statute 5 & 6 W. 4, c. 76, s. 2. That the plea did not negative, either expressly or impliedly, as it ought to have done, that there was any surplus annual income from the rents in question, and from other property of the borough, after payment of the interest of all lawful debts chargeable on the lands in question, together with the salaries of officers, and all other lawful expences, which on the 5th June, 1833, were defrayed out of, or chargeable on the same.

J. Henderson, in support of the demurrer.—The plaintiff, in his replication, departs from the declaration. For there he claims to be paid out of the rents of the allotted lands, and in his replication insists upon being paid out of the general property of the corporation. Moreover, no surplus is shown to have existed at the commencement of the action, and therefore it is consistent with the replication, that all the rents may have been applied to the payment of the interest upon the corporation debts. Suppose certain interest to have been due to creditors on the 3d November, the corporation would not be justified in paying the plaintiff on the 2d November.—[*Parke, B.*—The question will be, whether the plea is good. It ought to have stated, that the defendants were obliged to take the rents of the lands in question, for the payment of the debts of the corporation. It is consistent with this plea, that the defendants may have had sufficient to pay all their debts, together with the gratuities of the burgesses. The plaintiff, by resting his claim upon the bye-law, has made out a sufficient *prima facie* case.]—The plaintiff has no ground of action at common law, the second section of 5 & 6 W. 4, c. 76, s. 2 (a), does not give him any new right, but merely

(a) The second section enacts, "That every person who now is, or hereafter may be an inhabitant of any borough, and also every person who has been admitted, or who might hereafter have been admitted a freeman or burgess of any borough if this Act had not been passed, or who now is or hereafter may be the wife or widow, or son or daughter of any freeman or burgess, or who may

have espoused or may hereafter espouse the daughter or widow of any freeman or burgess, or who has been or may hereafter be bound an apprentice, shall have and enjoy and be entitled to acquire and enjoy the same share and benefit of the lands, tenements, and hereditaments, and of the rents and profits thereof, and of the common-lands and public stock of any borough or body

confirms him in the possession of his old rights. The declaration is bad, as it is not founded on a contract; nor does it rest upon a bye-law, which is defined in *Bacon's Abridgment*, "Bye-laws," to be a private law, "made for the conservation of order and good government, within some particular place or jurisdiction."—[Lord *Abinger*, C. B.—What is an ordinance, but a bye-law?]—The only ground of the action, is a rule or ordinance, which is not even pleaded as a bye-law. And, if it were, such bye-law would be bad, as tending to affect the rights of creditors.—[*Parke*, B.—The bye-law was not intended to have that effect; its object was to regulate the distribution of the corporate property.]—There is no consideration for the payment of this annual sum to individual burgesses, for the Act of Parliament recites, that the right of common was enjoyed, not by individuals, but by the burgesses in their corporate character. This rule, or ordinance, does not amount to a contract, *Dunston v. The Imperial Gas Light Company* (b). At all events, the plaintiff cannot maintain any action, for if there were any contract, it did not subsist beyond the life of the parties with whom it was made. The plaintiff must seek his relief in equity, for the defendants are merely trustees to the burgesses of the surplus, and no right of action attaches. This case comes within the principle of *Roper v. Holland* (c).

E. V. Williams, contra.—This action may be maintained; for where a benefit is given by law, it may be enforced by law. The right to the annual payment in question is given to the burgesses by a bye-law, which is *lex loci*, and therefore the case comes within the rule laid down by Lord *Holt*, *Mod. Ca.* 26. "So debt lies upon any Statute, which gives an advantage to another for the recovery of it, as upon the Stat. 32 H. 8, s. 1, for money devised, to be paid out of land." *Bac. Abrid.* "Debt," A. 9. The main question is, whether the plaintiff has any remedy at law, or whether he must resort to equity. The second section of the Municipal Act secures to parties all the rights that they possessed at the time of its passing; and the 92d section (d), prescribes to corporations a new mode of disposing of their property in payment of their debts; and it gives to parties, in the situation of

corporate, and of any lands, tenements, and hereditaments, and any sum or sums of money, chattels, securities for money, or other personal estate, of which any person or any body corporate may be seised or possessed, in whole or in part, for any charitable uses or trusts, as fully and effectually, and for such time and in such manner, as he or she, by any statute, charter, bye-law, or custom in force at the time of passing this Act, might or could have had, acquired or enjoyed in case this Act had not been passed."

(b) 3 B. & Adol. 125.

(c) 3 Ad. & Ell. 99; 1 Har. & Wol. 167; 4 Nev. & Man. 668.


(d) This section, after enacting that all corporate property and fines shall be carried to the account of the borough fund, provides that "Such fund, subject to the payment of any lawful debt

due from such body corporate to any person, which shall have been contracted before the passing of this Act and unredeemed, or of so much thereof as the council of such borough from time to time shall be required, or shall deem it expedient to redeem, and to the payment from time to time of the interest of so much thereof as shall remain unredeemed, and saving all rights, interests, claims, or demands of all persons or bodies corporate in or upon the real or personal estate of any body corporate, by virtue of any proceedings either at law or in equity, which have been already instituted, or which may be hereafter instituted, or by virtue of any mortgage or otherwise, shall be applied towards the payment of the salary of the mayor," and other officers, and towards defraying other expenses.

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the plaintiff, a-right to any surplus of the income of the corporation. There is, therefore, a statutory duty on the part of the corporation to dispose of their funds in the manner enjoined by the Act; and if they neglect to do so, an action of debt will lie against them.—[*Parke, B.*—The Municipal Corporations' Act does not give the plaintiff any additional rights, it merely preserves those which he enjoyed before. If before the passing of that Act his remedy was in equity only, it remains so still.—Lord *Abinger, C. B.*—The question is, if he could maintain an action at law independently of that Act of Parliament.—*Alderson, B.*—If his only remedy before the passing of the Act was in equity, he has no legal remedy now.]—This action was brought upon a bye-law, and the declaration is in the usual form, it not being necessary that the bye-law should be pleaded as such. The bye-law is not illegal; it is a mere substitution of a money payment for the enjoyment of rights of common. And the proviso at the end of the second section of the Act, that the rights of parties may be impeached or set aside, as if the Act had not passed, refers only to cases of rights that have been obtained illegally. The Act itself recognizes the rights of individuals to share in the rents of corporation lands.—[*Parke, B.*—The object of the plea is to shew that there were prior debts, to the payment of which the corporation were bound to apply their property, before they made payments to individuals. Suppose a corporation to be in debt, are the burgesses entitled to be paid, to the exclusion of the creditors?—A corporation cannot voluntarily pay creditors their entire debts, to the prejudice of a burgess's claim, as long as they have enough money to pay the interest of the debts; otherwise, every corporation that is in debt, and they are all in that state, would be enabled, by making payments to creditors, to defeat the claims of burgesses. The case would be different if the corporation were sued by its creditors. The plea does not negative the existence of a surplus, and therefore affords no answer to the action.—[*Parke, B.*—The plea does not state that any debts were due at the passing of the Act; that would be a ground of special demurrer.]—The object of the Municipal Act was to place their debts on the same footing as those of the nation; the interest was to be discharged, but the principal was not to be paid, unless there were a surplus. The plea does not state that the debts were charged on the land, from which the payments to the burgesses issued.

J. Henderson replied.

Lord *ABINGER, C. B.*—The first question is, if this declaration is good. It states that certain common and uninclosed land had been enjoyed by the burgesses of the borough of *Swansea*, but whether in their corporate or individual capacity, is not stated. That an Act of Parliament directed this land to be divided, with a view to its being profitably employed in agriculture. That upwards of sixty years ago the burgesses, in common-hall assembled, by an ordinance or bye-law directed leases to be granted of certain portions of this land: the intention being that some of the burgesses should derive benefit from the leases, and that others should receive certain portions of the rent arising from these leases. This bye-law contained nothing unreasonable, as it followed the provisions of the Act of Parliament, and the burgesses were merely receiving a sum of money by way of commutation, for the rights of common that they had lost. This state of things continued from 1762, till the passing

of the Municipal Corporations' Act. The effect of the first clause of that Act is to sweep away all rights ; but the manifest tendency of the entire Statute, is to preserve to individuals all rights to which they are properly entitled ; and as the burgesses took, in the commuted shape of rent, the same advantage that they had enjoyed as commoners, their right was the same, and was intended to be preserved by the Act. Then comes the question, whether a burgess can maintain an action upon this bye-law, and I am of opinion that he may. A bye-law, within the limits to which it is applicable, bears some resemblance to an Act of Parliament. In this case it bound the corporation, and if they withheld the rents, the party injured was at liberty to bring an action against them. It is not necessary to consider the general effect of the Act of Parliament upon the situation of the parties to this suit, it is sufficient to say that it did not take away the right of action from the burgesses, whose annual payments were withheld. The declaration being good, the question is, whether the plea can be supported. This division of the land took place under an Act of Parliament. It is not suggested on the record that there existed any obligations to previous creditors when this property came into the hands of the new corporation. If there had been a debt binding on the old corporation, it would have bound the new corporation also ; but there is no statement to that effect in the plea. The defendants should have alleged, that the debts which they had paid consisted of interest arising from debts charged on the allotted lands, else they do not establish any right to pay their creditors in priority to the plaintiff. It ought also to appear that the debts were due before the passing of the Municipal Corporations' Act ; but here there is no statement of any antecedent debts which can injure the rights of the burgesses. It may be that the plea was intended to convey such a statement, but it has not done so ; and moreover, the fact is denied by the replication. It is enough, however, to say, that the plea is bad on general demurrer, as it ought to have shewn an obligation on the part of the corporation to pay their debts, as well as a claim made by their creditors prior to that of the burgesses.

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PARKE, B.—The question is, whether this declaration, which is founded on an ordinance or bye-law, is good. I think it is ; and that independently of the Act of Parliament, an action could be maintained on this bye-law by the person who is to be benefited by it. The declaration does not state in what manner the corporators depastured the land ; but it alleges, that after the passing of the Enclosure Act, the corporation made a bye-law, by which they ordered the common-land to be leased, and the rent to be divided amongst the burgesses. By a subsequent bye-law, the annual payments to the burgesses are increased to ten pounds. I think, according to the argument of Mr. Williams, that this bye-law was binding on the corporation as *lex loci*. Each burgess then would be entitled to receive from the common attorney, the annual sum of ten pounds, and would, at common law, have a right of action for that sum, if it were withheld. The office of common attorney having been taken away by the Municipal Act, it became the imperative duty of the corporation to pay this sum to the burgesses. The Municipal Corporations' Act continues all parties in possession of the rights they have enjoyed by usage. Its effect is to constitute a right, subject to be defeated by law.

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The benefit, then, is converted into a right; and taking the bye-law and Statute together, the declaration shews a title to recover; for we are not to presume the existence of debts, with a view to prevent the corporation from complying with the bye-law. The question then is, whether the plea is good. It is framed on the ground, that the corporation may apply their funds in discharge of their debts accrued before the passing of the Municipal Corporations' Act, as they are not to grant a benefit to parties at the expense of creditors. We will suppose, for the present, that that view is correct. I doubt, however, whether the plea is not bad on general demurrer, for it only states payment of rents and money in satisfaction of debts then due and owing. The meaning of that must be, that the debts were due at the time of payment, not at the passing of the Act. But, then, it is argued, that this defect is cured, by the statements that the defendants *necessarily* paid these sums, and that they were *payable in priority and preference*. That, however, is not sufficient, as the defendants should have averred that they were under an absolute obligation to pay these debts. It is consistent with the plea, that they may have had property elsewhere, out of which the claims of creditors could have been satisfied. The Act of Parliament prevents the corporation from defeating the rights of their burgesses, by voluntary payments to creditors. The burgesses are entitled to be paid out of the surplus rents. It is to be observed, that the rights of creditors are not impaired by this mode of payment, as they are still at liberty to sue; and if they take the whole corporation property, there is an end of the annual payments to the freemen. It is unnecessary to consider whether this replication can be supported, for the plea being bad, our judgment must be for the plaintiff.

ALDERSON, B.—I think the corporation had authority to make this bye-law for the distribution of their funds; and that an action of debt would lie to recover the annual sums. It became the duty of the common attorney of the borough, to make these annual payments; and when that office was abolished, the duty devolved upon the corporation; and then an action of debt may be maintained against them. The plea is bad, as the corporation need not have paid their creditors more than they were actually compelled to pay. If indeed their creditors take away their lands, the rights of the freemen are at an end, as there is an end of that from which their rights were generated. I think the plea is bad also on the ground that it does not sufficiently state that the creditors had a claim to payment prior to that of the plaintiff. The plea in substance alleges, that the defendants paid the creditors, because they were of opinion that they had a right to pay them.

Judgment for the plaintiff.

DOE, on the several demises of THOMAS AMLOT and RACHAEL *Eschequer.*
his Wife, and DANIEL DAVIES v. REES DAVIES.

EJECTMENT to recover an undivided moiety of a dwelling-house, and garden and premises, situate in the parish of *St. Mary, Cardigan*, in the county of *Cardigan*. On the trial, before *Gurney, B.*, at the Summer Assizes for that county, 1838, the jury found a verdict for the plaintiff, subject to the opinion of the Court on the following case:—One *David James* being seised in fee of the house and garden in question, and of another dwelling-house and garden, in the occupation of one *David Davies*, on 9th *January*, 1817, duly made and executed his will, so as to pass real estates, in these words “I give and devise all that my messuage or dwelling-house and garden, with the rights, &c., in the tenure or occupation of *David Davies*, and also all that other my messuage or dwelling-house and garden, with the rights, &c., wherein I now reside, and both situate in *Pendre*, in the town of *Cardigan*, in the county of *Cardigan*, together with all deeds, papers, and writings whatsoever, thereunto belonging, unto the Rev. *Daniel Davies* and *John Mathias*, and their heirs, upon trust, that they the said Rev. *Daniel Davies* and *John Mathias* do and shall pay and apply the rents, issues, and profits thereof, and of every part thereof unto my dear wife, *Margaret James*, yearly and every year, during so long a time as she shall remain a widow, and from and after the determination of that estate, to the use and behoof of all and every of my child or children, by my said wife *Margaret James*, equally to be divided between them, share and share alike, and the lawful issue of their, or her, or his bodies or body for ever; and for default of such issue, to the use and behoof of my nephew, *David James*, his heirs and assigns for ever. I give, devise and bequeath unto my daughter, *Frances James*, the sum of 300*l.*, to be paid her when she attains the age of twenty-one years, and the house where she now lives, after the decease of her mother, or the day of her intermarriage; also I give, devise, and bequeath unto my daughter *Rachael James*, the sum of 300*l.*, when she attains the age of twenty-one years, and the house now in the occupation of Mr. *David Davies*, after the decease of her mother, or the day of her intermarriage; and in the case of either of my daughters aforesaid dying without lawful issue, before the said sum or sums are paid, then the share or shares of her or them dying, to be divided amongst the survivors or survivor of them. And I give, devise, and bequeath all my household

A testator being possessed of two houses and gardens, devised them to trustees in the following terms:—“Upon trust that they, the said *D. D.* and *J. M.*, do and shall pay and apply the rents, issues, and profits thereof, unto my wife, *M. J.*, yearly, during so long a time as she shall remain a widow; and from and after the determination of that estate to the use and behoof of all and every of my child or children by my said wife, *M. J.*, equally to be divided between them, share and share alike, and the lawful issue of their or her or his bodies or body for ever; and for default of such issue, to the use and behoof of my nephew, *D. J.*, his heirs and assigns for ever. I give, devise, and bequeath unto my daughter *F. J.* the sum of 300*l.*, to be paid her when she attains the age of twenty-one

years, and the house where she now lives, after the decease of her mother, or the day of her intermarriage. Also I give, devise, and bequeath unto my daughter, *R. J.*, the sum of 300*l.*, when she attains the age of twenty-one years, and the house now in the occupation of *D. D.*, after the decease of her mother, or the day of her intermarriage.” The two houses separately devised to the two daughters, were the same as those mentioned in the former part of the will. The testator, at the time of his death, left no other children than the two daughters mentioned in his will, and they, after the death of their mother, *M. J.*, entered into the separate possession of the two houses. *F. J.*, one of the daughters, afterwards died, and the defendant, her husband, continued in possession of the dwelling-house in her occupation. An ejectment having been brought by the other daughter to recover an undivided moiety of this house:—

Held, that the two daughters took an estate for life in each house, with remainder to them as tenants in common in tail; and therefore that the plaintiff was entitled to recover.

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furniture, moveable estate and effects, of what nature or kind soever, not already bequeathed, unto the said Rev. *Daniel Davies*, and *John Mathias*, subject to the payment of my legacies aforesaid, just debts, and funeral expences, in trust for my wife, *Margaret James*, to be enjoyed by her, and be at her own disposal, during so long time as she continues my widow; and after the determination of that estate, to be divided amongst all and every my child or children by my said wife, *Margaret James*, as shall be living at the time of her decease or intermarriage, and the lawful issue (if any) of her or them so dying, to have the share of such their parents, departing this life as aforesaid, equally divided between them, or amongst them; and in case of my wife, *Margaret James*, intermarrying with any husband after my decease, then I will and direct that the sum of 20*l.* be paid her by my said trustees, and I hereby revoke all former wills by me at any time heretofore made; and I appoint my said wife, *Margaret James* sole executrix of this my last will and testament. In witness, &c."

The testator died in *November*, 1821, without having altered or revoked his will, leaving his wife, *Margaret*, and two children only, viz., the daughters of him and his said wife *Margaret*, mentioned in his said will, surviving him. The house and garden and premises in question, are the house and premises described in the former part of the will, as the house in which the testator then resided; and in the latter part of the will, as the house wherein his daughter *Frances James* lived. *Margaret James*, the testator's widow, survived him and, on his death, took possession of both the houses and gardens mentioned in the will, and continued in the receipt of the rents and profits thereof until her death, on the 1st *June*, 1833.

At the time of making the will, the testator was aged 53 years, and his wife *Margaret* was aged 45 years.

On the death of the widow, the testator's daughter, *Frances*, who attained her age of twenty-one years on the 21st day of *September*, 1828, and who between the dates of the deaths of her said father and mother, namely, on the 10th day of *December*, 1829, had married the defendant, *Rees Davies*, took possession of the house and garden and premises in question; and the testator's daughter, *Rachael* (who on the 3d of *August*, 1833, married *Thomas Amlot*, the lessor of the plaintiff), took possession of the house and garden described in the will, as "the house and garden in the occupation of *David Davies*." The testator's daughter, *Frances*, died in *October*, 1833, leaving her husband, and their only child, *Hannah*, her surviving. *Hannah* died on the 15th *October*, 1836, an infant, and without ever having been married. The day of the demise laid in the declaration, was the 2d *January*, 1837. *Daniel Davies*, the lessor of the plaintiff, was the surviving devisee in trust, mentioned in the testator's will. The houses mentioned in the former and latter part of the will are the same. The question for the opinion of the Court was, whether, on the construction of the will, the plaintiff was entitled to recover an undivided moiety of the house in the possession of the defendant.

Points of argument on behalf of the plaintiff.

The plaintiff means to contend, that by the true construction of the will of *David James*, the limitations of the house in question, in legal effect, are as follows, viz., to the trustees during the life or widowhood of the testator's

widow, in trust for her, with remainder to his daughter, *Frances*, for life, with remainder to the testator's children, as tenants in common in tail, with remainder to the testator's nephew, *David James*, in fee; that consequently, on the decease of the widow, the daughter *Frances* being tenant for life in possession of the house in question, with an immediate remainder to herself and her sister *Rachael* (being the only children of the testator) as tenants in common in tail, became by merger of the two estates in respect of one undivided moiety of the house in question, tenant in tail in possession of such moiety; and that accordingly, upon her death, her husband, *R. Davies* (the defendant), became entitled thereto, as tenant by the curtesy, and her sister *Rachael* (the lessor of the plaintiff), became entitled to the other undivided moiety sought to be recovered in this ejectment.

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E. V. Williams, for the lessors of the plaintiff, cited *Powell on Devises*, by *Jarman*, 363; *Chambers v. Brailsford* (a); 1 *Preston on Estates*, 266; 3 *Preston on Conveyancing*, 483; 2 *Roll. Abrid.* 417, pl. 6, "Remainder;" 18 *Viner.* 393, pl. 6.

J. Wilson, for the defendant.—The testator intended to give to each of his daughters an estate tail in severalty in each house. This is clear, from his having used the words "equally to be divided," *Fisher v. Wigg* (b). He considers the houses to be equal in value, and therefore gives one house to each of his daughters. The word "his," which precedes "bodies or body," must be rejected, since it is clear that the testator intended to provide for his two daughters only, as he had no other children living at the time of his will, and of his death. His intention therefore being to divide his property equally between his daughters, that intention will be frustrated if the plaintiff's construction of this will is supported. For then it would follow, that if *Frances* had died, leaving issue, her sister would be entitled to three-fourths of this estate. He cited 2 *Powell on Devises*, by *Jarman*, 626; *Vin. Abrid.* "Devise," 249, pl. 1; *Atkins' Case* (c), *Doe, d. Stopford v. Stopford* (d), *Hardman v. Johnson* (e), *Doe. v. Gell* (f).

LORD ABINGER, C. B.—The intention of the testator is to be collected from the words of the will; and we must construe it, as we should do, if he had more property and other children. He gives to his wife an estate for life or widowhood, and then an estate tail to his daughters; and in a subsequent part of the will, he gives each of his daughters an estate for life in each house. The result is, that the plaintiff is entitled to recover an undivided moiety of the house in question.

PARKE, B.—If we were at liberty, to substitute our own conjectures, in the room of what is stated on the face of the will, we might perhaps be of opinion that the testator intended to divide the houses between the two daughters; but we are not to guess at the meaning of the testator, but to

(a) 19 *Ves. jun.* 652.
 (b) 1 *P. Wms.* 15.
 (c) *Moor*, 593.

(d) 5 *East*, 501.
 (e) 3 *Meriv.* 347
 (f) 4 *Dow. & R.* 387.

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construe the words of the will, and make them consistent if we can. This can be done by holding that the testator has given to each daughter an estate for life in each house, with remainder to them as tenants in common in tail, and then the lessor of the plaintiff will be entitled to recover an undivided moiety of the house in the possession of *Frances*.

ALDERSON, B., concurred.

Judgment for the lessors of the plaintiff.

TRIPP and others, Assignees of BENNETT, a Bankrupt, v. ARMITAGE and others.

B., a builder, undertook for a certain sum to build an hotel for a company, of which the defendants were the trustees, and to do all the work, except the plumbing and ironmongery, which were to be done by the defendants' workmen. It was agreed, that if *B.* became bankrupt, it should be lawful for the defendants to take possession of the work already done, and put an end to the agreement, and that they should pay to *B.* so much money only as should be adjudged to be the value of the work already done and fixed by him.

The defendants employed a clerk of the works, whose duty it was to inspect the materials supplied by the bankrupt, and none were used upon the building but such as had been approved by him. Before the hotel was completed, *B.* became a bankrupt. Shortly before the bankruptcy, some deal sash-frames, the subject among other things of the present action, were lying at the bankrupt's premises; to these the ironmongers of the defendants had supplied pulleys, and in this state they had been seen and approved by the clerk of the works. After the bankruptcy, the sash-frames were brought to the defendants' premises: the assignees then made a demand of the "sash-frames," and upon the defendants' refusal to deliver them, brought an action of *trover*:

Held, first, that this was a contract for the performance of certain work, and not for the sale of goods, and that the sash-frames did not become the property of the defendants until they were fixed to the building. *Held* also, that although the defendants might be entitled to keep the sash-frames, for the purpose of severing the pulleys, yet a demand of the sash-frames generally, and a general refusal, were evidence of a conversion.

Semble, that the defendants need not have pleaded specially that they kept the sash-frames for the purpose of removing the pulleys.

TROVER for deal sash frames and other goods and chattels. *Pleas*: first as to all the causes of action in the declaration mentioned, except as to the alleged conversion of part of the goods and chattels therein mentioned; that is to say, of a cylinder, &c., (not including the deal sash frames), Not Guilty; second, that the plaintiffs were not possessed, as of their own property, as such assignees aforesaid, of the said goods and chattels in the said declaration mentioned, to which the said first plea is pleaded, or any part thereof; and third, payment of money into Court, in respect of chattels admitted to have been converted by the defendants. The plaintiffs joined issue on the first and second pleas, and took the money out of Court, in satisfaction and discharge of their demand *pro tanto*.

At the trial, before Lord Abinger, C. J., at the *Gloucestershire* Summer Assizes, 1838, the following facts appeared in evidence. The plaintiffs were the assignees of *Bennett*, a bankrupt, and the defendants were the trustees of the *Cheltenham* Hotel Company. This company, having determined upon building a large hotel in *Cheltenham*, advertized for tenders, and several tenders having been sent in, they ultimately accepted that of the bankrupt, *Bennett*. A certain agreement was thereupon entered into between *Bennett*, of the first part; his sureties, of the second part; and the defendants, of the third part. This agreement recited, that the company had been formed for the purpose of building an hotel, with coach-houses and tap, and that plans and specifications had been made by *R. W. J.*, the architect of the company, and that such plans and specifications were intended to be lodged with the

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said *R. W. J.*, for the joint use of the said parties ; and that by agreements of equal date therewith, which had been submitted to the said *Bennett, Churchill* and *Mallory* had agreed to do the ironmongery, and *Mark Barrett* the painting, plumbing, and glazing, and that the said *Bennett* had agreed to do all the work, except as aforesaid, and papering, at the price of 15,381*l.* 8*s.* 4*d.* The agreement then stated, that the said *Bennett* covenanted for himself, his heirs, &c., with the defendants, that he would build the said hotel (except as aforesaid), and render the same fit for habitation, to the satisfaction of the said *R. W. J.* the architect, by the times therein mentioned, (here were enumerated various times, at which portions of the work were to be completed), and that if he the said *Bennett* should neglect to complete any one portion of the work by the time therein appointed, or several portions of the works, by the times respectively appointed, he should forfeit and pay, to the defendants, as liquidated damages, the sum of 250*l.*, and the defendants should be entitled to set off the said sum. The agreement also contained the following clause : “ And if the said *Thomas Hale Bennett*, his executors, or administrators, at any time or times, shall omit to go on with, or neglect to do the said works, matters, and things hereby agreed to be done by him, as expeditiously as he might do, in the judgment of the said *R. W. J.*, or other architect of the said company for the time being, or in case the said *Thomas Hale Bennett* shall become bankrupt or insolvent, or being arrested, shall go to gaol before the said work shall be completed and finished, then and in any or either of such cases it shall and may be lawful to and for the said *Edward Armitage, &c.* (the defendants), their heirs and assigns, to take possession of the work then already done by the said *T. H. Bennett*, his executors or administrators, and to avoid and put an end to this agreement, and thereupon the several clauses and agreements herein contained, on the part of the said *Edward Armitage, &c.*, their heirs, &c., shall be absolutely null and void to all intents and purposes whatsoever : And the said *Edward Armitage, &c.*, shall pay to the said *Thomas Hale Bennett*, his executors or administrators, or his or their assignee, as the case may be, so much money, and only so much money as the said *R. W. J.*, or the other architect for the time being of the said company, shall adjudge to be the fair worth of the work actually done and fixed by the said *T. H. Bennett* to the said hotel, as compared with the whole work to be done for the price of 15,381*l.* 8*s.* 4*d.*” It was also stipulated that *Bennett* should not be paid for any extra work, material, matter, or thing beyond 15,381*l.* 8*s.* 4*d.* The agreement also contained a proviso, that should the said trustees require any additions to or alterations in the said building, or the mode of doing the same, and should, by writing under their hands, counter-signed by *R. W. J.*, direct the same to be done, then such additions or variations should be made, but should not in any respect break or annul or make void the agreement ; but the difference caused by such additions or variations should be valued by the said *R. W. J.*, and should be paid to or allowed to the said *Bennett*, as the case might be. Then followed a covenant, by the defendants, to pay the money by instalments at certain dates, corresponding with the times at which the specified works were to be performed. There was also a proviso making the doing the work a condition precedent to payment, and making the architect’s certificate necessary before payment ; and another proviso, by which all disputes, arising out of the agreement, were referred to the arbitration of the *R. W. J.*, the architect.

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This agreement was executed by *Bennett*, his sureties, and the defendants. The defendants employed a clerk of the works, named *Turnbull*, whose duty it was to superintend the works whilst in progress, and examine the materials furnished by the bankrupt, and no materials to which he objected were employed in the building. Before the hotel was completed, *Bennett* became a bankrupt. Shortly before this time, he had in his workshop some deal sash frames, in which brass pullies had been inserted by *Churchill* and *Mallory*, the ironmongers employed by the defendants, and in that state they were inspected and approved by the clerk of the works. After the bankruptcy, they were brought to the hotel premises, and being demanded by the assignees, the defendants refused to give them up. This demand and refusal constituted the alleged conversion. By the course of dealing between the bankrupt and the defendants, the latter were in the habit of making occasioned advances to the former, as the work proceeded; and at the time of the bankruptcy, had advanced to him the sum of 81*£*. 11*s*. above the value of the work that had been done. Under these circumstances, the defendants contended at the trial, that the sash frames, and other property, having been bought specifically for the hotel, and money having been paid by the defendants upon them, they became the property of the defendants, and that at all events they had a lien upon them, in respect of the money so advanced. The value of the sashes and frames amounted to 9*£*. 5*s*. On the other hand it was insisted, that the property in the sashes passed to the plaintiffs, as assignees. Lord *Abinger*, C. B., in summing up the case to the jury, said, that the assignees were not in possession of the sashes, that they had no right to take them with the pullies in them, that they had not any right to claim the whole, and that if a certain witness was to be believed, the defendants were entitled to the verdict. The jury having, under this direction, found for the defendants, the learned Chief Baron gave the plaintiffs leave to move to enter a verdict for 9*£*. 5*s*., if the Court should be of opinion that the plaintiffs were entitled to recover the value of the sashes. A rule *nisi* having been obtained accordingly,

Maule and *Greaves* shewed cause.—The property in the sash frames passed to the defendants, the trustees, since they must be considered to have paid for them by means of their advances to the bankrupt, beyond the value of the work done by him. But payment was not absolutely necessary; for by the common law, nothing more is requisite to pass property in a chattel, than a contract on good consideration, and a pointing out of the specific chattel furnished under that contract. In *Dixon v. Yates* (a), *Parke, J.*, says “The very appropriation of the chattel is equivalent to delivery by the vendor, and the assent of the vendee to take the specific chattel, and to pay the price, is equivalent to his accepting possession. The effect of the contract, therefore, is to vest the property in the bargainee.” Here has been an appropriation of the property; for as soon as the sashes were completed by the addition of the defendants’ pullies, and the clerk of the works had expressed himself satisfied with them, they vested in the defendants. The case of *Maberley v. Sheppard* (b), may be cited on the other side, but is not ap-

(a) 5 B. & Adol. 340; 2 Nev. & Man.
 177.

(b) 10 Bing. 99; 3 Mo. & Scott, 436.

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plicable, as it turned upon a question of a sufficient acceptance, under the Statute of Frauds; and, besides, there was no approval or pointing out of the things sold. The present case is independent of that Statute; and, moreover, there has been a part payment.—[*Parke, B.*—You say the meaning of the contract is, that the property should pass to the defendants; but in reality the contract was, that the bankrupt should put the sashes into the house. The agreement was that he should be paid one sum for the entire work; there was no bargain as to each article.]—There need not be a bargain for each article to enable the property to pass. This case is not to be governed by the Statute of Frauds, which applies to contracts of sale and delivery only; whereas there are contracts where the sale of goods is only an ingredient, as, for instance, contracts for the performance of work and sale of goods at the same time; and to such the Statute would not apply. *Elliott v. Pybus (c)*, turned upon the question of acceptance. In *Atkinson v. Bell (d)*, there was no specific appropriation of the machines furnished under the contract. Here the window frames are the joint product of the labour of the bankrupt, and the materials of the defendants; and by allowing the pulleys to be put in, the defendants assented to the vesting of the property in them. In *Woods v. Russell (e)*, the rudder and cordage were approved by the purchaser of the ship, and they were held to pass to him. *Clarke v. Spence (f)*, is also in point.—[*Parke, B.*—That case did not proceed on the approval of the party who had ordered the vessel, but on the agreement to pay by instalments.]—In *Rhode v. Thwaites (g)*, property was held to pass by virtue of an appropriation.—[*Lord Abinger, C. B.*—Suppose the bankrupt had kept the frames in his shop, no action for goods bargained and sold could have been brought against him by the trustees.]—The rule of law, from all the cases, is, that where it is agreed that certain articles are to be the property of another, then, if they are identified and approved of, they pass to that other, whether there be a contract of sale or not. The defendants are tenants in common with the assignees of the frames, and acquired a title to them as soon as the pulleys, which were their property, were inserted. That being the case, they have not been guilty of a conversion; for a tenant in common cannot be guilty of converting the common property, unless he destroys it, *Fennings v. Lord Grenville (h)*. But in this case, the defendants have applied the property to the only use to which it was applicable. Again, the defendant had a lien on these sashes, and, being in possession of them, cannot be said to have converted them. A tenant in common may find it necessary to carry away the joint property for a particular purpose, as for instance, to weigh it, and then that act would not constitute a conversion. Here there has been no conversion, in fact, as the defendants were in possession of the property, and had a lien upon it, and, therefore, were not bound to plead specially, since by so doing they would have admitted a conversion, whereas none, in fact, had taken place, *Stanciffe v. Hardwick (i)*. A special plea in such a case, would have been bad, *Hartfort v. Jones (j)*. The new rules have not made it necessary to confess a conversion.—[*Parke, B.*—If the goods

(c) 10 Bing. 512; 4 M. & Scott, 389.

(d) 8 B. & Cr. 277; 2 M. & Ry. 292.

(e) 5 B. & Ald. 942; 1 Dow. & R. 587.

(f) 4 Ad. & Ell. 448; 1 Har. & Wol.
 760.

(g) 6 B. & Cr. 688; 9 Dow. & Ry.
 293.

(h) 1 Taunt. 241.

(i) 2 C. M. & Ros. 1.

(j) 1 Ld. Raym. 393.

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have been sold, the conversion must be justified. Under the new rules, the plea of not guilty denies the conversion in a different way from what it did formerly.]—*Owen v. Knight (k)*, shews, that under a plea denying the plaintiff's possession, a lien may be given in evidence. *Verrall v. Robinson (l)*, is also in point. The property in the sashes passed to the defendants under the agreement with the bankrupt, and they were not bound to pay for them. It was stipulated by the agreement, that *Bennett*, on failing to complete the work within the specified time, should forfeit 250*l.*; that if he became bankrupt, the defendants should be at liberty to take possession of the work already done, and that they were to pay for that portion only of the work that was done and *fixed*.—[*Parks, B.*—The defendants have not provided in their agreement for the case of goods that might be unfinished at the time of the bankruptcy.]—It is submitted, that the property in these sashes passed to the defendants, and that this rule must be discharged.

R. V. Richards, (*W. H. Alexander* with him,) *contra*, was desired to confine his argument to the construction of the agreement, and the question of pleading.—It is contended, on the other side, that, under the agreement, the defendants were entitled, on *Bennett's* becoming a bankrupt, to take all the property that was prepared, and to pay for that only which was fixed. Such a construction would be unjust, and at variance with the words of the agreement, which makes no mention of sashes, and only provides for "work" done.—[*Lord Abinger, C. B.*—Without doubt the specification includes sashes.]—The meaning of the agreement is, that the trustees are to pay for every thing of which they have the benefit.—[*Lord Abinger, C. B.*—If *Bennett* had neglected to complete the work, he would have forfeited 250*l.* under the agreement; but if he had gone to gaol, and had been unable to pay the 250*l.*, the argument of *Mr. Greaves* is, that the defendants were entitled to take the work done, as an equivalent.]—In that case also, the penalty would have attached. Secondly, the defendants are not entitled, under the pleas of Not Guilty, and denial of the plaintiffs' possession, to shew that they had as good a title to the possession as the plaintiffs'.—[*Parks, B.*—The defendants say that they have a right to separate the pullies from the frames, and to take the sashes for that purpose.]—It may be admitted, that where two parties are in joint possession of any property, neither can bring trover; but here, the bankrupt alone was entitled to the sash frames; for the pullies which belonged to the defendants were mere adjuncts. Can the owner of a horse which is harnessed to another's cart, justify taking away both horse and cart?—[*Lord Abinger, C. B.*—Suppose a demand is made of both.—*Parks, B.*—If both are demanded, and the owner of the horse keeps both, in my opinion, he would be guilty of a conversion.]—He was stopped by the Court.

LORD ABINGER, C. B.—I own I have felt anxious to find a ground for sustaining this verdict, as the case before us is an extremely hard one. The defendants pay money into Court as to certain property, and succeed in making out a defence as to the whole, with the trifling exception of some sash frames; and the omission to pay money into Court, in respect of these, will cause

(*k*) 4 Bing. N. C. 54; 3 Hodges, 245.

(*l*) 2 Cr. M. & Ros. 495; 1 Gale, 244; 5 Tyr. 1069.

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them to lose the verdict. I cannot adopt the first argument of the defendants, that, by the approbation of the clerk of the works, and the insertion of the pullies, the property in the sash frames passed to them. The contract in this case is not to buy certain moveables, but to make and fix articles to a building, and until they are fixed, no property passes. The defendants were not bound to pay for them till they were put up, and, without doubt, if they had been destroyed by fire, either wilfully or accidentally, the bankrupt could not have been called upon to make them good. The property remained in the bankrupt, although it had been approved by the servant of the defendants. The second point is, whether this was work done so as to entitle the trustees to take possession of it. Admitting, according to Mr. *Greaves*' argument, that the bankrupt intended these sashes to belong to the defendants, in the event of his bankruptcy, that contract would not bind the assignees. The goods of the bankrupt became the property of the assignees, from the time of the bankruptcy. One question remains, whether the defendants, who were the owners of the pullies, had a right to take away the frames, and refuse to re-deliver them. The demand was of the sashes, not of the pullies. But was there not evidence of conversion on the first taking? The defendants took possession of the sashes as their own; they did the same with many other articles. If the jury thought they took them as claiming a right to them, that would be a conversion. The refusal given by the defendants to the assignees is a refusal to deliver the frames. If the refusal had been qualified, if it had been accompanied by a statement that the defendants had not had time to separate the pullies from the frames, that would have destroyed the evidence of conversion. But the result of the general demand, and general refusal, was, that the defendants declined to deliver them in any state. The rule must, therefore, be absolute, to enter a verdict for the plaintiffs for 7*l.* 16*s.*, the value of the frames without the pullies.

PARKE, B.—I am also of opinion that this rule must be made absolute. The answer to the defendants' argument, on the first point, is short. We must look to the contract between the parties, to see what property passed. Here there was no agreement, as to this particular chattel. The contract was, that the bankrupt should build a house, and fix window frames in it, and the frames were not to become the property of the defendants till they were fixed to the freehold. It is argued, that the approbation of the surveyor constitutes an acceptance by the defendants, but it was not made *eo animo*: its only object was to compel the bankrupt to use good materials. Two questions then remain; the first is, whether the trustees were entitled to take the frames as work done within the meaning of the contract. Now if we look to the prior and subsequent parts of the contract, we shall see that the object was not that the bankrupt should prepare windows, but that he should fix them, and the trustees were to pay for the value of the work done and fixed; the work, therefore, cannot be considered to be done until it is fixed. Bankruptcy is a misfortune, and not a crime, and cannot, therefore, entitle these defendants to obtain more than is their due. They are to pay for all the works that are completed and fixed, and are to take what they pay for and no more. They are not entitled to take the sashes. Supposing this contract comprehends moveables, it is not to come into operation until after the bankruptcy, and even then it is uncertain whether the option of taking the work

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done, stipulated for in the agreement, will be exercised by the defendants or not. Besides, by the bankruptcy, the property is transferred to the assignees. Again, as this court is placed in the situation of a jury, I think we must say that the window frames were in the apparent ownership of the bankrupt. It may be a different question, whether the pullies were so, as they belonged to the trustees. The trustees, however, were not entitled to take possession of the sashes. The next question is, whether there has been a conversion. The contract being dissolved, the parties remain in *statu quo*. Here then are window frames with pullies attached to them. I think the frames must be considered the principal, and the pullies the accessories. The parties then being in the same state as before the contract, the owners of the pullies would be entitled to have nothing more than their pullies back again. But we find that the entire frames are taken away bodily to the defendants' premises, and a convenient time for separating the pullies from them having elapsed, that was sufficient evidence that the defendants took them away, not for the purpose of removing the pullies, but under a claim of property to the frames themselves. The conversion was, therefore, made out.

GURNEY, B.—The property in the sashes did not pass out of the bankrupt. The defendants, however, had a right to sever the pullies; but they take the frames as well as the pullies, and refuse to give up the former.

Rule absolute to enter a verdict for the plaintiff for 7*l.* 16*s.*,
 the value of the frames, exclusively of the pullies.

HALL v. HAWKINS.

The plaintiff having arrested the defendant on a writ of attachment out of *Chancery*, lodged with the sheriff a *capias utlagatum* against him. The attachment was afterwards set aside by the Master of the Rolls as irregular:—*Held*, that the defendant, who had been detained in prison, was entitled to be discharged out of custody on the writ of *capias utlagatum*.

THIS was a rule, calling upon the plaintiff to shew cause why the defendant should not be discharged out of custody, and why the plaintiff should not pay the costs of the arrest and of this application. On the 17th *December*, 1838, the defendant was arrested on a writ of attachment, issuing out of the Court of *Chancery*, for contempt, in not paying the sum of 16*l.* 18*s.* for costs due to the present plaintiff. On the evening of the 17th, whilst the plaintiff was in custody under the attachment, a writ of *capias utlagatum*, issuing out of this Court at the suit of the present plaintiff, was lodged with the sheriff. On the 20th *December* the defendant made an application to the Master of the Rolls, that the attachment might be set aside for irregularity, and that he might be discharged out of custody. The Master of the Rolls ordered the attachment to be discharged for irregularity. The defendant still remaining in prison on the writ of *capias utlagatum*, obtained the present rule, against which

Barstow now shewed cause.—If the writ of attachment under which the defendant was arrested had been void, he would have been entitled to be discharged out of custody on the *capias utlagatum*; but the first writ was irregular only, and that circumstance distinguishes this case from *Barratt v.*

Price (a). Again, the defendant is detained under a writ of *capias utlagatum*, which is a process issuing from the crown, and therefore different from a *ca. ca.* which is for the benefit of the individual. He cited *Mackie v. Warren (b)*, and referred to *The Mayor of Kingston-upon-Hull v. Bubb (c)*, *Goodman v. London (d)*.

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R. V. Richards, contra, was not called upon by the Court.

LORD ABINGER, C. B.—In the present case the defendant has been arrested by the same party who previously sued out against him a writ of attachment, which was pronounced irregular; and he was arrested whilst in custody under that irregular writ. If the arrest had been made by the sheriff, it might perhaps have been legal; but it is certainly not so when made by the plaintiff under the circumstances of this case. The plaintiff is seeking to take advantage of his own wrong.

PARKE, B.—I am of the same opinion. The plaintiff is attempting to derive an advantage from his own wrong. If a party improperly places another in custody, he is not permitted to keep him there. In this case the sheriff is protected. I entertained some doubt at first whether there might not be a distinction between a writ of *ca. sa.* and of *capias utlagatum*, as regarded the defendant's claim to be discharged out of custody; but I now think there is no distinction, inasmuch as the latter writ would not have issued but for the act of the plaintiff. The rule must be made absolute

Rule absolute.

(a) 9 Bing. 566; 2 M. & Scott, 144.
(b) 5 Bing. 176; 2 M. & Pa. 179.

(c) 1 Dowl. 151.
(d) 2 Dowl. 504.

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ASSUMPSIT for freight and general average. At the trial before *Williams, J.*, at the *Liverpool Summer Assizes*, the principal question in the cause was, whether the master of the vessel, as agent of the plaintiff, had omitted for an unreasonable time to present certain bills of exchange, payable at sight, and had thereby made them his own. The jury after deliberating thirty hours, found a verdict for the defendant, on the ground of the agent having kept the bills an unreasonable time. A rule was obtained for a new trial, on the ground that the verdict was against evidence, and also on an affidavit of the plaintiff's attorney, who stated that after the delivery of the verdict, he had been informed by a jurymen, that the jury had determined the question by drawing lots.

The Court will not, on a motion for a new trial, receive the affidavit of a party, stating that he was informed by one of the jury that the verdict was decided by the drawing of lots. Nor is the affidavit of a jurymen himself admissible for this purpose.

Cresswell and *Cowling* now shewed cause, and contended that the Court would not allow the verdict to be disturbed by means of the affidavit of a juror, still less would they receive an affidavit of what was said by any of the jury. (They then argued the case on the other ground.)

The Court will receive the affidavit of a party who actually saw the jury draw lots, or take the necessary steps for that purpose.

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Atcherley, Serjt., contra, cited Owen v. Warburton (a), Fry v. Hardy (b). Hale v. Cove (c), Aylett v. Jewel (d).

LORD ABINGER, C. B.—I wish to be understood as stating distinctly that this affidavit cannot be received. I am surprised that it was ever placed on the files of the Court; it ought never to have been there. It is not even an affidavit by a jurymen, of what took place in the jury-room, but of what was *said* by one of the jury to the plaintiff's attorney, after the delivery of the verdict. If such affidavits were received, no verdicts would be safe. If, indeed, we had had the evidence of some one who saw the jury draw lots, or send for a dice box; in that case, however satisfied I might be with the verdict, I should think it right to set it aside. But the rule cannot be made absolute on the present ground.

PARKE, B.—I think this affidavit cannot be received. It is an established rule, that an affidavit of a jurymen, alleging his own misconduct, cannot be read. The Courts, indeed, have received an affidavit of what a bye-stander has heard fall from the jury, but that is a very different matter. I wish to be understood as founding my opinion on the general principle, that it would be fatal to the administration of justice if such an affidavit were admitted.

ANDERSON, B.—I entirely concur in the rejection of this affidavit. It contains a statement of a fact, which it appears, some jurymen *alleged* to have taken place in the jury-room. How can we tell that such fact actually took place? The only means of raising the question would be by the affidavit of a jurymen; and such affidavit, if produced, could not be read. (The Court after hearing the arguments on the other point, discharged the rule on both grounds.)

Rule discharged (e).

(a) 1 New R. 326.

(b) Sir T. Jones, 83.

(c) 1 Stra. 642.

(d) 2 W. Black. 1299.

(e) There appear to be only two cases in which the Courts have received affidavits of what was *said* by jurymen to other persons. Those cases are *Dent v. Hundred of Hertford*, 2 Salk, 645; *Parr v. Seames*, Barnes' Notes, 438. An affidavit of this kind was refused in *Aylett v. Jewell*, 2 W. Black. 1299; and in *Hindle v. Birch*, 8 Taunt. 26; 1 Moore, 455. In *Philips v. Fowler*, Barnes' Notes, 441, the affidavit of a juror was received; and the same appears to have been the case in *Hale v. Cove*, 1 Stra. 642. In *Wats v. Brains*, Cro. Eliz. 778, which was an appeal of

murder, the Court examined the jurors separately as to the grounds of their finding, and on discovering that they had misconducted themselves, sent them back to reconsider their verdict, and fined and imprisoned ten of them. In *Fasie v. Delaval*, 1 T. Rep. 11, and in *Owen v. Warburton*, 1 N. Rep. 326, the Court held that they ought not to receive the affidavit of jurors, who stated that the verdict had been decided by lot. In *Jackson v. Williamson*, 2 T. R. 281, the Court refused to receive the affidavits of all the jury who stated that by mistake they had given a verdict for a smaller sum than they intended the plaintiff to receive. And see *Davis v. Taylor*, 2 Chit. Rep. 268; *Clarke v. Stevenson*, 2 Black. 803; *Milsom v. Hayward*, 9 Price, 134.

DAVIS and another v. LOVELL.

Exchequer.

CASE for not attending as a witness, in pursuance of a subpoena.—The declaration stated, that whereas in a certain action of ejectment then depending, such proceedings were held, that afterwards, to wit, on the 31st March, 1838, before certain justices of Assize and *Nisi Prius*, of our Lady the Queen, to wit, at Taunton, in the county of Somerset, a certain issue before them joined in the said plea, came on to be tried: And whereas before the trial of the said issue, to wit, on the 21st March, the now plaintiffs prosecuted out of the Court of *Exchequer* a writ of subpoena, directed to the now defendant, and one John Doe; by which said writ, our Lady the Queen commanded the said now defendant to appear before her justices, assigned to hold the Assizes in and for the county of Somerset, at Taunton, in the said county, on Saturday, the 31st March then instant, and so from day to day until that cause should be tried, to testify the truth, &c., in the said action so depending as aforesaid, and at the aforesaid day to be tried; and also to produce and show forth on the trial of the said issue, certain documents; which said writ the plaintiffs afterwards and before the trial of the said issue, to wit, on the 2d April, in the year aforesaid, caused to be made known and shewn to the now defendant, and then caused a copy to be left with the now defendant, and then tendered and offered and paid to the now defendant, a certain sum of money, to wit, the sum of 5*l.*, being a reasonable sum of money for his costs and charges in and about his attendance as a witness, according to the tenor of the said writ of subpoena; and that *although the appearance of the said defendant was necessary and material* at the said trial of the said issue, and although the said defendant could and might in obedience to the said writ of subpoena, have appeared at the said trial of the said issue, and could and might, in obedience to the said writ of subpoena, have produced and shewn forth, or caused to be produced and shewn forth, at the time and place aforesaid, on the said trial of the said issue the said documents so mentioned, and referred to in the said writ of subpoena as aforesaid, and thereby so required to be produced and shewn forth as aforesaid, and although the production and shewing forth of the said docu-

pending, and to produce certain documents on the trial of the said issue, and that although the defendant might have appeared at the trial of the said issue, and might have produced the said documents at the time and place aforesaid, on the said trial of the said issue, yet the defendant would not, at the time and place aforesaid, on the trial of the said issue, at the time and place aforesaid, produce the said documents. The replication stated, that the trial of the said issue in the said declaration mentioned took place on the 6th day of April, 1838, and that the defendant could have appeared at the said trial of the said issue.

Held, first, that it sufficiently appeared, on general demurrer, that the trial referred to in the subpoena took place at the Assizes mentioned in the declaration.

Secondly, that an averment that "the appearance of the defendant was material and necessary at the trial," was equivalent to an averment that the plaintiffs had a good cause of action.

Thirdly, that an action will lie for disobedience to a subpoena served after the first day of the Assizes, and commanding the witness to attend on that day, and so from day to day until the cause is tried, provided the trial takes place within a reasonable time after service of the subpoena.

Fourthly, that it is not necessary to aver that the absence of the defendant, as a witness, was the sole cause of the plaintiffs failing in their action. That that fact is important only with regard to the amount of damages to be recovered in an action against such witness.

Fifthly, that an averment, that the defendant would not appear or produce certain documents at the time and place of trial, although he was then and there solemnly called upon for that purpose, is sufficient on general demurrer.

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ments were material evidence for the now plaintiffs on the said trial, whereof the now defendant then had notice, yet the said defendant did not nor would at the time and place aforesaid, on the said trial of the said issue, either appear or produce, and shew or cause to be produced or shewn forth, the said documents so mentioned and referred to in the said writ of subpoena as aforesaid, or either of them, although the now defendant was then and there *solemnly called* upon for those purposes, and had no lawful or reasonable excuse or impediment to the contrary; but therein wholly neglected and refused so to do, and by reason thereof the plaintiffs were then forced and obliged to allow the nominal plaintiff to become, and he was then nonsuited in the said action.

Plea: that the said Assizes at which the said defendant was required, by the said writ of subpoena, to attend as aforesaid, commenced and were held at *Taunton*, in the said county, on *Saturday*, the 31st day of *March*, in the year aforesaid, being the day in the said subpoena in that behalf mentioned as aforesaid; and the defendant further says, that after the expiration of the said 31st day of *March*, to wit, on the 2d day of *April*, in the year aforesaid, and not before, the said plaintiffs for the first time caused to be made known and shewn to the said defendant, the said subpoena, and a copy thereof to be left with him as aforesaid, he the said defendant then being at *Wells*, in the said county, at a distance, to wit, thirty miles from *Taunton* aforesaid.

Replication: that the plaintiffs caused the said writ of subpoena to be made known and shewn to the defendant, and a copy thereof to be left with him, on the said 2d day of *April*, in the year aforesaid; and that the trial of the said issue, in the said declaration mentioned, took place and was had after the said service of the said writ of subpoena, on the 6th day of *April* in the year aforesaid and not before; and at the time of the said service of the said writ of subpoena, the defendant had notice that the said issue had not then been tried, and that a reasonable time elapsed after the said service of the said writ of subpoena, and before the said trial of the said issue, whereby and wherein the defendant could and might, in obedience to the said writ of subpoena, have appeared at the said trial of the said issue, and could and might in obedience to the said writ of subpoena, have produced the said documents so mentioned and referred to in the said writ of subpoena, and thereby so required to be produced and shewn forth, as in the declaration mentioned.

Demurrer and joinder.

The causes of demurrer assigned, were as follows:—that although the said replication does not traverse that the said Assizes at which the said defendant was required by the said writ of subpoena to attend, and produce the said documents, and testify as aforesaid, were held at *Taunton*, in the county aforesaid, on *Saturday* the 31st day of *March*, in the year aforesaid, being the day in the said subpoena in that behalf mentioned, as alleged in the said first plea, yet the said replication confesses and admits that the plaintiffs, after the expiration of the said 31st day of *March*, to wit, on the 2d day of *April*, in the year aforesaid, and not before, caused to be made known and shewn to the said defendant the said subpoena, and a copy thereof to be left with him as aforesaid; and that it is not alleged, nor does it appear that the said Assizes, in the said subpoena mentioned, were continued after the expiration of the said 31st day of *March* aforesaid, and at the time of and after the service of the said sub-

poena as aforesaid, or that the defendant had any notice thereof; and that it is not alleged, nor does it appear, that the defendant could and might, in obedience to the said subpoena have appeared at the said Assizes, therein mentioned as aforesaid, nor that he had any notice that the said issue would be tried at the said Assizes, after the service of the said subpoena as aforesaid, nor that the said trial of the said issue did in fact take place at the said Assizes in the said subpoena mentioned, and not at a subsequent and other Assizes, or elsewhere.

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Butt, in support of the demurrer.—The Assizes began on the 31st *March*. The service of the subpoena was on the 2d *April*; at that time, in point of law, the Assizes were concluded. There is no averment that they continued beyond that day. Again, although it is stated in the replication that the cause was tried on the 6th *April*, it is not averred that it was tried at the Assizes to which the subpoena related.—[Lord *Abinger*, C. B.—That fact is sufficiently averred, if the declaration and replication are taken together.]—Secondly, the statement of the plaintiffs, that “the appearance of the defendant was material and necessary,” is not sufficient. It ought to have been alleged that the plaintiffs had a good cause of action, which would have enabled them to get the verdict, but for the absence of the defendant; and that the non-appearance of the latter was the *sole* cause of their being nonsuited. If the averments of the plaintiffs are held sufficient, it will follow that they will be entitled to recover, although their failure may have been occasioned by the absence of other witnesses, in addition to that of the defendant.—[*Alderson*, B.—If that argument is valid, all those witnesses would have the same excuse. Suppose the case had gone to the jury, and they had found a verdict for the defendant, how could the plaintiffs prove that the verdict was owing to the absence of the present defendant? A jurymen could not be called to prove that fact.]—Suppose the plaintiffs had failed at the trial for want of proving five links in a derivative title, of which the documents in the possession of the defendant formed one link, ought they to recover against the defendant, merely because his evidence might in some sense be called “material”?—[*Parke*, B.—That argument goes rather to the question of damages than to the right of action.]—In *Masterman v. Judson* (a), which was an action for not obeying a subpoena, the declaration stated that the defendant could have given “material evidence” for the plaintiffs, and that by reason of his non-appearance, “and on no other account whatsoever, the said plaintiffs were nonsuited.” So in *Amey v. Long* (b), it was stated in the declaration, that the warrant omitted to be produced was “material evidence for the plaintiff on the said trial, and would have enabled the plaintiff to have obtained a verdict on the said issue, against the said *K. S.*” In *Mullett v. Hunt* (c), the declaration alleged that the defendant could have given “material evidence for the plaintiffs;” that “without his evidence the plaintiffs could not safely proceed to the trial;” and that by reason of his absence, and because the plaintiffs could not safely proceed to the trial of the cause, they were forced to, and did withdraw the record. There, indeed, the words were held to be equivalent to an averment, that there was a good cause of action; but the ground of that judgment is, that the case came before the

(a) 8 Bing. 224.
(b) 9 East, 474.

(c) 1 Cr. & M. 754.

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Court after verdict.—[*Parke, B.*—Is there any difference, as respects this question, between a verdict and general demurrer?—*Alderson, B.*—The averment in this case is in substance the same as the allegation in *Mullett v. Hunt*. The plaintiffs state that “the appearance of the defendant was material and necessary;” that is equivalent to a statement that they had a good cause of action.]—It ought to have been averred, that the defendant was called upon at the trial under such circumstances, as rendered him liable to an attachment for a contempt. The declaration should have stated that he was called upon his subpoena, or by the Court, or after the time of attendance mentioned in his subpoena. It is not enough to allege that he was “solemnly called upon.”—[*Parke, B.*—That averment is sufficient on general demurrer.]—Again, this action cannot be maintained. It is brought against the defendant for not appearing, according to the exigency of the writ of subpoena. Now, that writ was served on the 2d April, and calls upon the defendant to appear on the 31st March.—[*Parke, B.*—The subpoena commands the defendant to appear from day to day till the cause is tried; that is the mandate of the writ; is he not bound to obey it, if it is served at a convenient time?—In *Alexander v. Dixon (d)*, it was held that an attachment would not lie for disobeying a subpoena, which was not served until after the day mentioned in it for the appearance of the witness.—[*Parke, B.*—The ground of refusing the attachment in that case was, that the witness had received no notice that the cause had not been tried on the day that he was commanded to appear.]—It is not alleged here that the defendant had time to be present at the trial.—[*Parke, B.*—The declaration states that he could, and might have appeared at the trial; and the replication states, that at the service of the subpoena, he had notice that the cause had not been tried.]—It is not averred that the defendant received notice that he had a reasonable time for going to the Assizes.

Barstow, contrd.—The only material question here is, whether there is a sufficient averment that the cause came on to be tried at the Assizes, to which the subpoena related. The declaration states, that on the 31st March, a certain issue came on to be tried at Taunton, in the county of Somerset, before certain justices of Assize; that the defendant was commanded by a subpoena to attend those justices, at the time and place above mentioned, and so from day to day until that cause should be tried; that although the appearance of the defendant was material and necessary at the said trial of the said issue, yet that he would not appear at the time and place aforesaid, on the trial of the said issue.—[*Parke, B.*—That is equivalent to an averment that the issue was tried at the time and place aforesaid.]—Secondly, it is sufficient to aver that the witness was “material,” and that the plaintiffs failed for want of his evidence. Of course it would be necessary to prove, on the second trial, that a good case could not be established without him. (He was stopped by the Court.)

Lord ABINGER, C. B.—I think it sufficiently appears from the declaration and replication, that the cause mentioned in the subpoena, was tried at the time and place stated in the declaration. That disposes of the principal objection. The next question is, whether the plaintiffs were compelled to aver

that they had a good cause of action. They state that the appearance of the defendant at the trial was "material and necessary;" now, evidence could not be material, unless a party had a good cause of action. No judge would put off a trial on account of the absence of a material witness, unless the party applying had a good cause of action. As to the other objection, that the subpoena was served after the commencement of the Assizes, if we were to consider it a good one, it would affect the validity of half the writs of subpoena that are sued out.

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PARKE, B.—I am of the same opinion. The first objection is, that there is no averment that the cause in question was tried at the Assizes referred to in the subpoena; and if the omission had been made the ground of special demurrer, I should have considered the declaration bad; but the demurrer being general, I think it sufficiently appears that the cause was tried at the time and place mentioned in the declaration. The next objection is, that there is no averment that the plaintiffs had a good cause of action; whether such an averment is necessary we are not called upon to say. It is clear, however, that a good cause of action must exist to make it the duty of a witness to attend at the trial. In *Mullett v. Hunt* (e), it is laid down, that an averment that evidence is "material," is equivalent to an allegation that the party had a good cause of action. The averment in the present case is similar to that in *Mullett v. Hunt*. With regard to the want of an allegation, that the plaintiffs' failure was owing solely to the absence of the defendant, that is a circumstance which does not affect the plaintiffs right of action, but merely the amount of damages. I, therefore, think the declaration good on general demurrer. Then comes the question raised by the plea and replication, whether an action will lie for disobedience to a subpoena which is served on the 2d April, and commands a party to attend from the 31st March, and so from day to day until the cause is tried. Whether under such circumstances, an attachment would be granted, is a different question. In my opinion an action may be maintained. The first day of the Assizes having elapsed at the time of the service of the subpoena, it was the duty of the defendant to obey the writ, by attending from day to day until the cause was tried. The plaintiffs are, therefore, entitled to our judgment.

ALDERSON, B.—I think it sufficiently appears that the cause, for which the defendant was subpoenaed, was tried at the Assizes mentioned in the declaration.

Judgment for the plaintiffs.

(e) 1 Cr. & Mee. 762.

IN THE EXCHEQUER CHAMBER.

(In Error from the Court of Exchequer.)

Exch. Chamber.

NELSON and WIFE (late WATERWORTH) v. SERLE (a).

To an action on a promissory note at twelve months' date, the defendant below pleaded, that one *J. W.*, at the time of his death, was indebted to the plaintiff below in a sum of money for goods sold and delivered, and that the plaintiff, after the death of *J. W.*, and before the making of the note, applied to defendant for payment, whereupon in compliance with the request, the defendant after the death of *J. W.*, for and in respect of the said debt, and for no other consideration whatever, then made and delivered the note to the plaintiff; that *J. W.* died intestate, and that at the time of the making and delivery of the note, no administration had been granted of the estate and effects of *J. W.*, nor was there at that time any person liable for the said debt; and that there was never any consideration for the said debt except as aforesaid:—*Held*, on error, (after judgment for the plaintiff *non obstante veredicto*), that the plea sufficiently negatived a consideration for the note, and that judgment ought to be reversed.

DEBT, upon a promissory note, made by the defendant below, in favour of the plaintiff below, dated the 3d January, 1837, for 24*l.* 1*s.* 4*d.*, "value received," payable twelve months after date. There was also a count upon a count stated.

To the first count the defendant pleaded, that one *Joseph Waterworth*, before, and at the time of his death, to wit, on the 2d January, 1837, was indebted to the plaintiff in a certain sum of money, to wit, 24*l.* 1*s.* 4*d.*, for the price and value of goods, by the plaintiff then sold and delivered, to the said *Joseph Waterworth*, which sum was due and owing to the plaintiff at the time of making the said promissory note, in the first count mentioned; and that the plaintiff, after the death of the said *Joseph Waterworth*, and before the making of the said note, to wit, on the 2d January, 1837, applied to the defendant for payment thereof; whereupon, in compliance with the said request, the defendant after the death of the said *Joseph Waterworth*, for and in respect of the said debt, so then remaining due to the plaintiff as aforesaid; and for no other consideration whatever, then made and delivered the said note to the plaintiff. And the defendant further says, that the said *Joseph Waterworth* died intestate, to wit, on the same day and year aforesaid; and that at the time of the making and delivery of the said note as aforesaid, to the plaintiff as aforesaid, no administration had been granted of the estate and effects of the said *Joseph Waterworth*; nor was there at that time any executor, or executrix of the estate and effects of the said *Joseph Waterworth*; nor was there at any time any person liable for the said debt so remaining due to the plaintiff as aforesaid. And the defendant further says, that there never was any consideration for the said note, except as as aforesaid. *Verification.*

To the last count the defendant pleaded, *nunquam indebitatus*.

Replication to the first plea, *de injuriâ*; on which issue was joined.

Addison, for the plaintiffs in error.—There does not appear on the face of these pleadings any consideration whatever for the payment of this note, by the defendant below. There is nothing to shew that she was the wife of the intestate debtor, or so related to him as to have incurred a moral obligation to pay the debt. It does not appear on this record that she was executrix or

(a) See the case (*Serle v. Waterworth*) on which this writ of error was brought, *ante*, p. 281. The plaintiff

in error, subsequently to the decision of the Court of *Exchequer*, had married the other plaintiff in error *Nelson*.

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administratrix, or so connected with the intestate as to be bound, or to be likely to take out administration of his effects, nor does it appear that she had in her hands any property belonging to him. She is to all intents and purposes a perfect stranger to the intestate, and not liable to be sued by the plaintiff below, or any other person in respect of the debts of the intestate. But then it will be said, that a sufficient consideration for this note appears in the fact of the plaintiff below having been damnified by reason of his forbearance to sue the defendant below for the space of a year. But the plaintiff below does not appear on this record to have had any right of action against the defendant below, therefore there could be no damage; and by consequence, no consideration. In *Jones v. Ashburnham* (b), the plaintiff declared that A., since deceased, was indebted to him for goods sold, and that after the death of A., in consideration of the premises, and that the plaintiff at the instance of the defendant would forbear, and give day of payment of the debt (not stating to whom he was to forbear), the defendant promised to pay it. This was held on demurrer to be no consideration for the promise, since unless there were some person whom the plaintiff could have sued for his debt, his forbearance was no detriment to him. In the present case there could be no forbearance on the part of the plaintiff below, as it does not appear, on this record, that there was any one against whom he had a right of action. The fallacy, on the other side, consists in assuming that it appears *on the record* that the defendant below was the wife of the intestate, or that she took out letters of administration, or was bound to do so. It is true that she *was* the wife of the intestate, and that after the making of the note, she *did* take out letters of administration; but those two facts cannot be imported into the argument, because the Court will not look beyond the record. The Court below was misled by supposing that this case resembled *Ridout v. Bristow* (c). That was an action brought against a woman, who after the death of her husband, gave a note expressed in these terms, "for value received *by my late husband*." It was proved also that she was administratrix. In that case, Bayley, B. says, "she appears to have been administratrix; but even admitting that she was not, and supposing that out of respect to the memory of her late husband, she had agreed to give a note of what was due from him, would not such a note be binding? I take it that it would." In the present case, it does not appear from the *record*, that the defendant below was wife of the intestate debtor, or administratrix of his effects. But then, it will be said, that as this action is brought upon a promissory note which, *prima facie*, imports consideration; and it was the duty of the defendant below to negative all consideration, and that the proper way of doing so was, to allege that she had no assets. The defendant below has negatived all consideration; for she avers in her plea, that in compliance with the request of the plaintiff below for payment, "for and in respect of the said debt so then remaining due to the plaintiff as aforesaid, *and for no other consideration whatever*, she then made and delivered the said note to the plaintiff." And again she concludes her plea with the averment, "that there never was any consideration for the said note, except as aforesaid." As to the necessity of denying the existence of assets, such denial can be necessary only on the assumption that it appears from the record, that the

(b) 4 East, 455.

(c) 1 Cr. & Jer. 231.

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defendant below was actually administratrix, or bound to take out letters of administration. It cannot be necessary for the defendant below to deny the existence of every consideration that the imagination can suggest. It is sufficient for her to deny in general terms the existence of any consideration. If any consideration for this note really existed, the plaintiff below ought to have stated it in his replication.

Wightman, contra.—It was the duty of the defendant below to exclude every possible consideration, and for this purpose she ought to have shewn that no one was liable for the debt of the intestate, and that there were no assets out of which it could be discharged. It is easy to suggest many circumstances which would form a good consideration. If I have a debt due to me from *A. B.*, and *C. D.* gives me a note for that debt, payable at twelve months, is not the delay to which I am subjected, a good consideration for the note?—[*Tindal, C. J.*—The defendant below alleges that she paid the debt because she was requested by the plaintiff below, and then she avers that there was no other consideration; if there were, the plaintiff might have replied to it.]—The defendant below might have intended to take out letters of administration. This case resembles *Ridout v. Bristow*.—[*Bosanquet, J.*—In *Ridout v. Bristow*, the wife was *primâ facie* entitled to take out letters of administration.—*Tindal, C. J.*—Does not the defendant below, in her plea, make this statement in substance? “I was a stranger to *Waterworth*, and I paid the note because the plaintiff asked me.”]—It does not appear on the plea that she was a stranger to *Waterworth*.—[*Tindal, C. J.*—She says there was no other consideration for the payment of the note, except the request of the plaintiff.]—The plaintiff below, having a good *primâ facie* case, the defendant below ought to have alleged, either that she had no assets of *Waterworth* in her hands, or that the money was not owing from *Waterworth*, or that she did not intend to take out letters of administration; or, at all events, she ought to have made some equivalent averment.

Addison, replied.

Lord DENMAN, C. J.—In reversing this judgment, our opinion does not come into conflict with that of the Court of *Exchequer*, since that Court acted on the authority of *Ridout v. Bristow*, whereas the facts of that case do not apply to the present. It seems to have been assumed by the learned barons, that the defendant below was the wife of the intestate *Waterworth*, when in truth, no such fact appears upon the face of the record. In *Ridout v. Bristow*, it appeared that the maker of the note was the widow of the debtor, and was his administratrix; and indeed, the note itself purported on the face of it to be given, “for valued received by my late husband.” It is clear therefore, that in that case the forbearance to sue, must have formed the consideration of the note. The judgment of the *Exchequer* must therefore be reversed.

Judgment reversed.

STANBURY v. MATTHEWS.

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ASSUMPSIT. The declaration stated, that on the 29th day of *June*, 1836, it was agreed by and between the plaintiff and the defendant, that the plaintiff should buy, and he did then buy of the defendant, and that the defendant should sell, and he did then sell, to the plaintiff [a certain large quantity of potatoes, to wit, the produce of about 100 lugs of land, at the price of 2*s.* per sack, to be delivered by the defendant to the plaintiff within a reasonable time in that behalf, and to be paid for by the plaintiff to the defendant on the delivery thereof, as aforesaid] (mutual promises); and although the plaintiff, ever since the making of the said agreement, had been ready and willing [to receive the said potatoes at the price aforesaid, and to pay for the same on delivery, at the rate and price aforesaid, of all which the defendant always had notice, and heretofore, and after the making of the said agreement and promises, and before the commencement of this suit, to wit, on the 4th day of *July*, 1837, was required by the plaintiff to deliver to him the said potatoes at the price aforesaid, and a reasonable time for the delivery thereof elapsed long before the commencement of this suit; yet the defendant, not regarding, &c., did not, within a reasonable time, and hath not at any time since the making of the said agreement, delivered or tendered and offered to deliver to the plaintiff the said potatoes, or any part thereof.]

The defendant pleaded, first, *non-assumpsit*; secondly, that before breach of the agreement, it was rescinded by consent of both parties.

At the trial, before *Coltman, J.*, at the last *Wiltshire* Assizes, it appeared that the plaintiff and defendant had met together in *June*, 1836, on which occasion the defendant said, that he had planted about 100 lugs of land with potatoes, and that he would sell them at 2*s.* a sack. The plaintiff agreed to purchase them at that price, and he was to find diggers. When the potatoes were ripe, the plaintiff accordingly sent diggers to take them up, but the defendant refused to permit them to come upon the land. It was objected, on the part of the defendant, that the evidence did not support the declaration, inasmuch as by the contract there stated, the potatoes were to be delivered within a reasonable time, and to be paid for on delivery. The learned judge, upon the application of the plaintiff's counsel, amended the declaration, so as to be conformable to the evidence, and the parts within brackets stood thus :—[A certain large quantity of potatoes then planted, and being in certain land of the defendant, at the price of 2*s.* per sack, the same to be dug by the plaintiff at the usual time for digging the same, and to be paid for by the plaintiff to the defendant, at the said last-mentioned time.]

[To receive, take, and dig the said potatoes, and to pay for the same at the rate and price, and at the time last-aforesaid, of all which the defendant always had notice, and heretofore and after the making of the said agreement and promises, and before the commencement of this suit, to wit, on the 30th day of *October*, 1836, the same being the usual time for digging the said potatoes, the defendant was required by the plaintiff to permit and suffer him to dig and take the said potatoes; yet the defendant, not regarding, &c., did not, nor would then, nor at any time since, permit and suffer the plaintiff to dig and

A contract for the sale of potatoes then planted, at a certain sum per sack, to be dug up at the usual time for digging the same, is not a contract for the sale of an interest in land, within the fourth section of the Statute of Frauds.

The declaration stated that the defendant agreed to sell to the plaintiff, a certain quantity of potatoes, to be delivered by the defendant to the plaintiff, within a reasonable time; it then alleged, that although a reasonable time had elapsed, the defendant had not delivered the same. It appeared from the evidence that the potatoes were to be dug by the plaintiff, at the usual time for digging the same, and that the defendant refused to permit the plaintiff to dig and take them. The judge having amended the record accordingly, the Court refused a new trial, as it did not appear by affidavit that the defendant was prejudiced by the amendment.

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take the said potatoes, or any part thereof, but on the contrary thereof, wholly refused so to do, (the same land being in the possession of the defendant), whereby, &c.]

A verdict having been found for the plaintiff, damages 5*l.* 10*s.*,

Crowder moved, pursuant to leave, to enter a nonsuit, on the ground that this was a contract for the sale of an interest in land, or for a new trial, on the ground that the judge had no power to make the amendment; first, this contract falls within the fourth section of the Statute of Frauds, and, therefore, required a note or memorandum in writing. It is a contract for the sale of potatoes, to be taken up by the vendee, and he must necessarily have the benefit of the land until they were ripe.—[*Parke, B.*—Suppose a tempest had destroyed them in the mean time, the defendant must have stood the loss.]—It is only a contract to sell at a future day so many sacks of potatoes, the produce of certain land. In *Parker v. Staniland (a)*, a similar contract was held not to be a sale of an interest in land, because there the potatoes were to be taken by the defendant immediately, and the land was considered as a mere warehouse for them. The distinction which was taken in *Evans v. Roberts (b)*, between crops that would be emblements, and the ordinary produce of the land is hardly maintainable. In *Earl of Falmouth v. Thomas (c)*, it was held, that a contract to let with a farm certain growing crops upon it, at a valuation contract, was a contract for the sale of an interest in land. It is difficult to distinguish between a contract for the sale of a growing crop of potatoes and a contract for the sale of a growing crop of grass which has been held to be within the Statute, *Carrington v. Roots (d)*. Secondly, the amendment should not have been made. It introduced upon the record an entirely different contract; and if the plaintiff had so declared in the first instance, the defendant might have pleaded differently.

Lord ABINGER, C. B.—The Statute allowing amendments vests a wide discretion in the judge; and in this case it appears, by the result, that he has not exercised it improperly. If it had been shewn, by affidavit, that the defendant had a good defence, with which he was not prepared at the time, the Court might have allowed him to plead *de novo*; but as it does not appear that he was prejudiced by the amendment, the Court cannot interfere.

As to the first point, I think this was merely a contract for the sale of goods and chattels on a future day.

PARKE, B.—This is nothing more than a contract for the sale of potatoes at so much per sack, the produce of a certain field, and to be taken at a future day. It creates no interest in the land. It is a stronger case than *Evans v. Roberts*; there the agreement was to pay a certain price for the whole crop of potatoes; and there might be some colour for saying it was an interest in land; but here, the only stipulation is to pay so much per sack for the potatoes when delivered. I am not quite clear about the propriety of the amend-

(a) 1 East, 362.
 (b) 5 B. & C. 829.
 (c) 1 C. & M. 89.

(d) 1 Mur. & Hurl. 14; 2 M. & W. 248.

ment; but unless the judges are liberal in the allowance of amendments, the rule which confines a plaintiff to one count will operate very harshly.

Exchequer.
STANBURY
r.
MATTHEWS.

GURNEY, B., concurred.

Rule refused.

Mogg and another, Assignees of PURNELL, an Insolvent Debtor, v. BAKER.

IN this case, the parties having objected to the reference recommended by the Court (a), the cause was again tried, before *Parke*, B., at the last *Bristol* Assizes, when it appeared that the bill of sale included not only the furniture of the value of 170*l.*, respecting which the agreement was made between the insolvent and the defendant, but also other furniture, of the value of 35*l.*, subsequently purchased by the insolvent. With respect to this latter amount, the question was, whether there was a voluntary conveyance or transfer of these goods, within the 7 *Geo.* 4, c. 57, s. 32. The examination of the defendant, on the hearing of *Purnell* in the Insolvent Debtors' Court, was put in, by which it appeared, that the defendant had stated that *Purnell* "offered him security spontaneously."

In order to support a transfer by an insolvent debtor, it is not necessary that there should be a pressure on the part of the creditor, but if the transfer be made in pursuance of a *bona fide* demand by the creditor, it is not within the 7 *Geo.* 4, c. 57, s. 32.

The learned judge, as to the furniture not included in the agreement, left it to the jury to say whether the assignment originated with the insolvent, and was made to the defendant as a favoured creditor, or whether it originated in the request of the defendant: he told them that pressure of the creditor was not necessary; but that if it originated with the insolvent, it could only have been made by way of voluntary preference. The jury having found a verdict for the defendant,

Crowder now moved for a new trial, on the ground of misdirection.—The mere fact of a creditor asking a debtor for a security, is not sufficient to render a transfer valid. There must be some pressure or fear of compulsion. This case is governed by the same principle as a voluntary preference under the Bankrupt Act; and then the question is, whether there was an intention to prefer one creditor to the general body, *Cook v. Rogers* (b). It is evident, from *Arnell v. Bean* (c), that something beyond a mere request must be proved. If the act, by which one creditor obtains an advantage, be done of the free will of the insolvent, it is a fraud upon the general body of the creditors.—[*Parke*, B., referred to *Doe v. Gillett* (d).]—In *Reynard v. Robinson* (e), the payment was made in consequence of a threat of legal proceedings, and was, therefore, held not to be voluntary.

LORD ABINGER, C. B.—I am of opinion that both the verdict and direction are right. It appears that *Purnell* said, that he executed the bill of sale

(a) *Ante*, p. 57; 3 *M. & W.* 198.

(b) 7 *Bing.* 438

(c) 8 *Bing.* 87; 1 *M. & Scott*, 151.

(d) 2 *C. M. & R.* 579.

(e) 9 *Bing.* 717; 3 *M. & Scott*, 127.

Eschequer.
Mogo
v.
BAKER.

because, if he did not, he apprehended that the defendant would put in a distress. I do not, however, think that that was necessary. It seems to me, that if a demand be made by a creditor, without any fraud, and a security is given, in pursuance of that demand, that takes the case out of the voluntary transfer contemplated by the act.

PARKE, B.—I certainly laid down the law to the jury as I have always understood it to be. If the jury had found their verdict the other way, I should have been just as well satisfied; but I cannot say that they are wrong.

GURNEY, B., concurred.

Rule refused.

In re CANADIAN PRISONERS.

An application for a *habeas corpus* must be supported by an affidavit of the party applying, unless it appear to the Court that such affidavit cannot be obtained.

ROEBUCK applied for writs of *habeas corpus* to bring up the bodies of certain persons sent to this country from *Canada*, and now in the custody of the gaoler of *Liverpool* Gaol. He moved on the affidavits of third persons.

LORD ABINGER, C. B., asked if he had also affidavits of the facts, made by the prisoners themselves.

Roebuck submitted that it was not necessary, and referred to the case of *The Hottentot Venus* (a).

LORD ABINGER, C. B.—There the party was supposed to be under coercion. You must either produce affidavits from the parties themselves, or shew facts from which the Court can judge that they cannot be obtained

(a) 13 East, 125

GEORGE DEWDENEY v. PALMER.

An objection to the competency of a witness, must be taken on the *voir dire*.

ASSUMPSIT by indorsee against indorser of a bill of exchange. The pleas denied the presentment and notice of dishonour.

At the trial, before *Gurney*, B., at the *Middlesex* Sittings, in the present Term, a witness was sworn, on behalf of the plaintiff, as *James Dewdney*, but who was recognized to be *George Dewdney*, the plaintiff, on the record. On the part of the defendant, it was proposed to prove that this witness was, in fact, the plaintiff. The learned judge refused to admit this evidence, on the ground that it did not relate to the matters in issue, and a verdict was found for the plaintiff for the amount of the bill.

Platt moved for a new trial, on the ground of the improper rejection of the evidence, and contended that he was entitled to shew that the witness was altogether undeserving of credit.

Eschequer.
DEWDENEY
v.
PALMER.

PARKE, B.—Your objection goes to the competency of the witness, and should have been taken on the *voir dire*; you might then have offered evidence that he was incompetent, as being the plaintiff in the suit. But you are not entitled to prove he is a party, without first objecting to his competency. If the incompetency had been established, an opportunity would be afforded to the plaintiff to prove his case by other evidence.

ALDERSON, B.—The credibility of the witness is a collateral issue. If the objection had been taken as to the witness's competency, other evidence might, perhaps, have been supplied.

Rule refused.

YOULTON v. HALL.

WALLINGER moved to set aside a copy of the writ of summons and service thereof, on the ground that it was not properly indorsed with the residence of the attorney. The indorsement was as follows:—"This writ was issued by *James Robertson*, No. 10, *Gray's Inn-square, Holborn*, attorney for the said *J. Youlton*." It was objected, that the city or county ought to have been stated, and *Lloyd v. Jones (a)*, was referred to, in which the Court held it insufficient to state that the writ was issued by *W. L. No. 32, Great James-street, Bedford-row*, agent for the plaintiff, in person, who resides at *Dartmouth*.

The following indorsement on a writ of summons, was held sufficient: "This writ was issued by *J. R., No. 10, Gray's Inn Square, Holborn*, attorney for the said *J. Y.*"

LORD ABINGER, C. B.—That case does not apply; for there no attorney's name was indorsed on the writ; and we held, that the residence of the plaintiff himself ought to have been stated.

PARKE, B.—The Statute does not require the city to be mentioned, where the writ is sued out by an attorney. The form given in the schedule of the 2 *Will.* 4, c. 39, is, "This writ was issued by *E. T.*, of _____, attorney for the said *A. B.*" But where the writ is issued by the plaintiff, in person, the Statute directs mention to be made of the "city, town, or parish, and also the name of the hamlet, street, and number of the house of the plaintiff's residence." It is quite enough, with regard to an attorney, if such a description be given as can mislead nobody.

GURNEY, B.—In *Engleheart v. Eyre (b)*, it was held, that the residence of an attorney was sufficiently described by the indorsement "*Gray's Inn, London*," although it appeared that no part of *Gray's Inn* was within the city of *London*. There *Patteson, J.*, says, "If it were the statement of the residence of an individual not an attorney, it might be different."

Rule refused.

(a) 5 Dowl. P. C. 161.

(b) 2 Dowl. P. C. 145.

Eschequer.

RAMSBOTTOM v. DAVIS (Robert).

Same v. GOSDEN.

By agreement in writing, three persons undertook in consideration of A.'s discharging a debt due from B. to C., amounting to 200*l.*, with costs, that each would severally pay 50*l.*, and one fourth part of the costs, and would execute a bill, bond, or note, for his own proportion: Held, that one stamp was sufficient.

ASSUMPSIT. The declarations were upon the following guarantee:—
 “ We, the undersigned, *R. Davis, W. Goodchild, and J. Gosden, severally and respectively* undertake, in consideration of Messrs. *Ramsbottom and Leigh* discharging or arranging to discharge a certain debt due from *Wm. Davis* to *J. Sheffen*, amounting to the sum of 200*l.*, with the costs thereupon, to indemnify the said Messrs. *Ramsbottom and Leigh* for any loss which they may sustain or incur to the extent of 50*l.*, from each of us to be paid by us *severally*, together with a fourth part of the costs and expences as aforesaid, at such time or times as the said Messrs. *R. and L.* may be called upon to pay the said debt and costs, to be rateably proportioned, and in the meantime, we further undertake to make and execute such bills, bonds, or notes severally for the said respective sums, as may be required by the said Messrs. *Ramsbottom and Leigh*.

“ *R. Davis.*

“ *W. Goodchild.*

“ *G. Gosden.*”

At the trial, before *Gurney, B.*, at the *Middlesex* Sittings, in this Term the above guarantee was given in evidence, and appeared to be stamped with one stamp only. It was objected, on the part of the defendant, that as each party contracted severally, three stamps were necessary. The learned judge allowed it to be read, and a verdict was found for the plaintiff, with liberty to move to enter a nonsuit.

W. H. Watson moved accordingly.—One stamp is not sufficient, as this is the separate contract of each, not the joint contract of all. Each party agrees to indemnify to the extent of 50*l.*; each party agrees to pay one-fourth of the costs, and to execute a bond for his respective share. This case is distinguishable from *Bowen v. Ashley* (a); there a bond was entered into by three conditioned for the performance, by each and every of them of the same matters; but there was but one penalty, and a payment of that by any one of the obligors would satisfy the condition.—[*Parke, B.*—It resembles a composition deed, by which each of the creditors, who signs, agrees to take part or postpone payment of his separate debt.]—That is the case of a separate covenant in respect of the same subject matter; this is the separate contract of each. Where a lease is made to several persons of different lands, at different rents, one stamp is sufficient, because the whole is but one transaction, *Rose v. Jackson* (b); but here, each individual makes a distinct contract in respect of his portion.—[*Parke, B.*—It may be reasonably supposed that one party would not have bound himself, unless the others had agreed to pay their share. It is the same as when several creditors agree each to release his debt in consideration of the others doing the same.]—An agreement with several tenants, as to the demise of different estates, requires a

(a) 1 N. R. 274

(b) 3 B. & R. 185.

stamp for each, *Doe, d. Copley v. Day (c)*. So where printed conditions of sale are signed by different purchasers of different lots, *Powell v. Edmunds (d)*. Where the several admissions of five corporators, as freemen, were written on the same paper, it was held to require several stamps, *Rex v. Reeks (e)*.

Exchequer.
RAMSBOTTOM
v.
DAVIS.

PARKE, B.—I am of opinion that this is but one transaction, and that one stamp only is necessary. It may fairly be considered that each has entered into the agreement in consideration that the others would do the same. Where several underwriters, on a policy, enter into an agreement to refer the cause to arbitration, one stamp is sufficient, *Gaulson v. Forbes (f)*. So where there is an agreement by several for a subscription to one common fund, *Davis v. Williams (g)*. This case appears to me to fall within the principle of these decisions.

ALDERSON, B.—I am of the same opinion. The parties altogether agree to indemnify the plaintiff to the amount of 150*l.*, by separately contracting to pay 50*l.* each. It is all one transaction.

Rule refused.

(c) 13 East, 241.
(d) 12 East, 6.
(e) 2 Lord Raym. 1445.

(f) 6 Taunt. 171.
(g) 13 East, 232.

DOE, dem. HARVEY v. FRANCIS.

IN this case a bill of exceptions had been tendered at the trial, and error was assigned thereon in the *Exchequer Chamber*. The Court of Error affirmed the judgment of the Court below.

Costs in a bill of exceptions, are costs in a Court of Error,

Montague Smith moved for a rule for the Master to review his taxation, and allow the plaintiff the double costs of the bill of exceptions. By the 13 Car. 2, Stat. 2, c. 2, s. 10, it is enacted, "That if any person shall sue or prosecute any writ of error for the reversal of any judgment whatsoever, given after verdict, and the said judgment shall be afterwards affirmed, then every such person shall pay unto the defendant, in the said writ of error, his double costs, to be assessed by the Court where such writ of error shall be depending." It was doubtful whether the costs of settling the bill of exceptions should be taxed by the Court above, or the Court below; for since the 11 Geo. 4, and 1 W. 4, c. 70, the record remains in the Court below, and a transcript only is sent to the Court of Error. Before that Statute, it appears, from the case of *Gardner v. Baillie (a)*, that a bill of exceptions was no part of the record in the Court below. The Master, in the Court of Error, had conceived that these costs were now costs in the Court below, and the Master of this Court had refused to allow the double costs, as the Statute of *Charles* directs them to be assessed by the Court where the writ of error is depending.

Exchequer.
DOE, dem.
HARVEY
v.
FRANCIS.

PARKE, B.—The 11 *Geo.* 4, and 1 *W.* 4, c. 70, s. 8, directs that a transcript of the record shall be annexed to the return of the writ, and the Court of Error, after errors duly assigned and issue in error joined, shall review the proceedings, and *give judgment* as they shall be advised thereon. The costs are part of the judgment; it is one and the same act. The application should, therefore, be made to the Court of Error.

Rule refused.

SEALEY v. HARRIS.

To an action against the defendant for wrongfully refusing to permit goods distrained by him to be appraised, the defendant pleaded that plaintiff was his tenant, and that he took the goods as a distress for arrears of rent: *Held*, an issuable plea.

THE declaration, in substance, stated, that the plaintiff was tenant to the defendant of certain premises, and that the defendant seized and took certain goods and chattels of the plaintiff, under colour of a distress, and under pretence of certain rent alleged to be due, that the plaintiff was entitled to replevy, and that the goods remained in the custody of the defendant, and it became necessary to apply to the defendant to appraise the goods, yet the defendant wrongfully refused to permit the plaintiff to appraise the said goods.

A judge's order had been obtained for further time to plead upon the usual terms of pleading issuably, when the following (amongst other) pleas was delivered:—

“And for a further plea in this behalf, as to the said first count, the defendant says, that for a long time, to wit, for three weeks before the said time, when, &c., in the said first count mentioned, the plaintiff held the said apartments and premises, with the appurtenances in the said first count mentioned, as tenant thereof to the defendant, as in the said first count mentioned, by virtue of a certain demise theretofore, to wit, on the 29th day of *October*, in the year aforesaid, made by the defendant to the plaintiff, at and under the weekly rent of 1*l.* 10*s.*, payable weekly, that is to say, on *Sunday* in each and every week from the making of the said demise; and because the sum of 3*l.* of the rent aforesaid for the space of two weeks, ending on *Sunday*, the 11th day of *November*, in the year aforesaid, was due and in arrear from the plaintiff to the defendant, and continued in arrear and unpaid from thence until and at the said several times when, &c., in the said first count mentioned, the defendant seized and took the said goods and chattels in the said first count mentioned, and detained the same at the said several times, when, &c., in the said first count mentioned, as for and in the name of a distress for the said arrears of rent, and committed the supposed grievances in the said first count mentioned, as she lawfully might for the cause aforesaid.” *Verification.*

The plaintiff signed judgment, on the ground that this was not an issuable plea. An order was subsequently made of *Gurney*, B., for setting aside that judgment, and a rule having been obtained, by *Prideaux*, for rescinding the order of *Gurney*, B.,

Byles shewed cause.—The plea is issuable. So long as it is doubtful, whether a person is entitled to distrain, the party whose goods are taken

under the distress has a right to replevy them. But, immediately it appears that the distress was lawful, the right to replevy is determined. In every case it may be said that a man has a right to bring an action; but after he has failed, it is evident that the right never existed. This resembles the case of an action against the sheriff for an escape on *mesne process*. There it is necessary, in order to maintain the action, to aver and prove that the plaintiff had a cause of action against the person who escaped, *Gunter v. Clayton* (a), *Alexander v. Macauley* (b).

Exchequer.
SEALEY
v.
HARRIS.

Prideaux, in support of the rule.—This is not an issuable plea. It is a fundamental principle of the common law that a person, whose goods are distrained, is entitled to replevy. Even if the plaintiff, in replevin, be nonsuited, he is allowed by the Statute of *Westminster*, 13 *Edw.* 1, c. 2, a judicial writ, issuing out of the original record, and called a writ of *second deliverance*, in order to have the same distress again delivered to him, on giving the like security as before (c). The 11 *Geo.* 2, c. 19, which requires the officer granting a replevy on a distress for rent, to take a bond with sureties in a sum of double the value of the goods distrained, shews, that in all cases the party is entitled to replevy. It is said, in *Co. Lit.*, "That if a man, by his deed, grant a rent, with a clause of distress, yet the sheriff may replevy the goods distrained, for it is against the nature of such distress to be irreplevisable."

PARKE, B.—We cannot decide, upon this motion, whether or no the plea is good in point of law. It is quite clear that it is *bonâ fide* pleaded. The principle is the same as that which regulates an action against the sheriff for an escape on *mesne process*. The party has *primâ facie* a right to sue, yet if he had no cause of action against the debtor, he cannot maintain an action against the sheriff. The plea goes distinctly to the merits.

Rule absolute

(a) 2 Lev. 85.

(c) Blac. Com. Vol. 3, 149.

(b) 4 T. R. 611.

ROGERS v. PETERSON.

BARSTOW had obtained a rule calling on the plaintiff's late attorney to shew cause why he should not pay the costs of the taxation of his bill, more than one-sixth having been taken off. The bill had been delivered under a judge's order, and had been referred for taxation, but there was no undertaking, on the part of the plaintiff, to pay what should be found due on taxation. Before the bill was delivered, the amount of the judgment given for the plaintiff had been levied by the sheriff, and paid by him into Court, to abide the event of an interpleader rule.

An attorney is not bound to pay the costs of taxation, where more than one-sixth has been taken off his bill, unless the order contains the undertaking required by the 2 *Geo.* 2, c. 23, s. 23, or money has been paid into Court for that purpose.

Swann shewed cause.—The 2 *Geo.* 2, c. 23, s. 23, requires that there shall be a submission of the party to pay the whole that upon taxation shall appear to be due. Here the order contains no such undertaking. It is true, that the money has been brought into Court; but it has been paid in, not as a security for the attorney, but to abide the event of a disputed claim. *Howard v. Groom* (a), is an authority in point. In *Gerrard v. Arnold* (b), it was

(a) 4 Dowl. P. C. 21.

(b) 6 Dowl. P. C. 336.

Exchequer,
ROGERS
 v.
PETERSON.

decided, that where, on reference of an attorney's bill to taxation, the parties agree to waive the delivery of a signed bill *prima facie*, they waive the operation of the 2 Geo. 2, as to payment of the costs of taxation.

Barstow, in support of the rule.—The money paid into Court stands in the place of an undertaking to pay what shall be found to be due. After the execution issued, the plaintiff's attorney gave notice to the sheriff not to pay the proceeds to any but himself, as he had a lien on the judgment. The money in Court must be considered as a security for the attorney.

Lord ABINGER, C. B.—I think this rule must be discharged, but without costs. As the money was not brought into Court for the purpose of settling the bill, but for another purpose, arising incidentally, this is not a case within the Statute.

PARKE, B.—This does not appear to be a case within the Statute, and unless it is, we have no power to grant the rule. The 2 Geo. 2, c. 23, s. 23, enacts, that upon submission of the party to pay the whole sum that upon taxation of the bill shall appear to be due to the attorney, it shall be lawful for the Court, &c., to refer the bill to be taxed and settled by the proper officer of such Court, without any money being brought into the said Court for that purpose. The question then is, whether the money brought into Court stands in the place of an undertaking. I think not, unless it was originally appropriated to the payment of the bill, or it was afterwards agreed between the parties that it should be so appropriated. It seems to me, therefore, that we have no jurisdiction.

Rule discharged.

RUSK v. KENNEDY.

A description of the defendant in the writ and declaration by the initials of his christian name, is no ground for setting aside the proceedings, but the proper course is to apply to a judge to amend the declaration, at the plaintiff's costs.

THE defendant was sued and declared against by the initials of his two christian names, and a rule had been obtained by *Archbold* to set aside the writ and subsequent proceedings, or to amend the declaration at the plaintiff's cost, the action not being brought upon a bill of exchange or other written instrument.

Jardine shewed cause.—Before the 3 & 4 Will. 4, c. 42, the designation of the defendant's christian name by initials was no ground for setting aside the writ, but could only be taken advantage of by plea in abatement. Since that Act, "no plea of abatement for misnomer shall be allowed in any personal action; but in all cases in which a misnomer would, but for the Act, have been, by law, pleadable in abatement in such actions, the defendant shall be at liberty to cause the declaration to be amended at the cost of the plaintiff, by inserting the right name upon a judge's summons, founded upon an affidavit of the right name." In *Lindsay v. Wells* (a), the plaintiff described himself in his declaration as "*Henry H. Lindsay*," and the Court refused to set it aside.

(a) 4 Scott, 171.

Archbold in support of the rule. This is not a mere case of misnomer, for the initials are no name at all. The application to amend by summons is not compulsory. *Lindsay v. Wells* arose upon a bill of exchange.

Eschequer.
RUSK
v.
KENNEDY.

PARKE, B.—As the declaration and process agree, the only ground of objection is, that of misnomer. Before the late Act, it was matter pleadable in abatement; but since that Act, the defendant ought to apply to a judge to amend the declaration at the plaintiff's costs.

Rule discharged, with costs.

HOLLAND v. HENDERSON.

PRIDEAUX had obtained a rule for judgment, as in case of a nonsuit; against which

Pashley shewed cause, and contended that the rule ought to be discharged, on the ground that the defendant had become insolvent after action brought, and a *stet processus* had been offered and declined.

The insolvency of defendant after action brought, is a sufficient answer to a rule for judgment as in case of a nonsuit.

The Court, referring to *Smith v. Badcock* (a), said, that the rule must be discharged with costs, unless the defendant consented to a *stet processus*.

Rule discharged, with costs.

(a) 5 Dowl. P. C. 91.

DUDDEN v. TRIQUET.

KNOWLES had obtained a rule *nisi* for setting aside a plea of *puis darrien continuance*, which alleged a judgment to have been recovered against the defendant, as administratrix on the 5th *January*. The plea was pleaded on the 14th *January*, (the 13th being *Sunday*.) An affidavit accompanied the plea, stating that the "plea thereunto annexed was true in substance and in fact, and that the matters therein contained, arose within eight days next before this day, being the 14th day of *January*;" It was objected, that the plea was not pleaded within the time limited by the rule of *H. T.*, 4 *Will.* 4, which provides "that no plea of *puis darrein continuance* shall be allowed, unless accompanied by an affidavit, that the matter thereof arose within eight days next before the pleading of such plea."

On the 14th *January*, (the 13th being *Sunday*), the defendant pleaded, *puis darrien continuance*, judgment recovered on the 5th *January*: *Semble*, that the plea was in time.

Pawse shewed cause. By the eighth rule of *H. T.*, 2 *Will.* 4, it is ordered, "that in all cases in which any particular number of days, not expressed to be clear days, is prescribed by the rules or the practice of the courts, the same shall be reckoned exclusively of the first day, and inclusively of the last day, unless the last day shall happen to fall on a *Sunday*, *Christmas-day*, or *Good Friday*, or a day appointed for a public fast or thanksgiving, in which case the time shall be reckoned exclusive of that day also." Here the 13th being *Sunday*, the case fell within the above rule. If the Court should hold, that the plea ought under the circumstances to have been delivered on the 12th, it would make both days inclusive. In *Pepperel v. Burrell* (a), an order for seven days time to plead

(a) 2 Dowl. P. C. 674; 1 C., M. & R. 373.

Eschequer.
DUDDEN
v.
TRIQUET.

was obtained on the 15th *May*, and on the 22d pleas were delivered, but they were irregular in several respects, and on the evening of that day, the plaintiff signed judgment as for want of a plea, and it was held that the judgment was signed too early. In *Ryland v. Wormwald* (b), it was expressly decided, that the eighth rule of *H. T.*, 2 *Will.* 4, applied to pleas in abatement.

Knowles in support of the rule. The defendant should have applied to the Court, to be allowed to plead this matter, after the eight days had expired. The affidavit appears on the face of it to be false.—[*Parke, B.*—The defendant means, that the matter arose within eight legal days, according to the rule. It should have stated that it arose within nine days, the last of the eight days having been *Sunday*.]—It clearly appears that the eight days have been exceeded.

PARKE, B.—I am of opinion that we cannot set aside the plea.—If the meaning of the rule of *H. T.*, 4 *Will.* 4, be, that every plea of *pross darrein continuance*, shall be accompanied by an affidavit, that the matter thereof arose within eight days, then here there is such an affidavit. But if the rule mean, that every matter since the last continuance shall be pleaded within eight days from the time it occurred, then the general rule applies, which prescribes that one day shall be taken exclusive and the other inclusively, unless the last day should happen to fall on a *Sunday*, in which case that day also is to be excluded. My present impression is, that the effect of that rule is to extend the time of pleading in this case to nine days. But it is unnecessary to decide that point, because here for aught we know the plea may have been pleaded within the eight days.

Rule discharged.

(b) 1 *Mur. & Hurl.* 73; 5 *Dowl. P. C.* 581.

YOULTON v. HALL.

Where a copy of a writ of summons stated the action to be "an action on the case promises," the Court set it aside for irregularity.

WALLINGER had obtained a rule to set aside the copy of a writ of summons and service thereof for irregularity. The form of action was thus stated, "in an action on the case promises." He referred to *Gurney v. Hopkinson* (a), in which it was held, that "trespass on the case on promises," was an improper description of the cause of action.

Humfrey shewed cause.—It is evident that the word "on" has been omitted, and the Court will so intend. In *Cooper v. Wheale* (b), the omission of the word "on" before the word "promises" was held to be immaterial. Here the words "the case" are surplusage, and may be struck out.

PARKE, B.—In *Cooper v. Wheale*, the words were "action promises" from which it was clear, that assumpsit was intended. The description here given would do either for an action for a nuisance, or for goods sold and delivered. Then it is said that the objection may be cured, by striking out the superfluous words; but the difficulty is to know which to reject. If the word "promises" be struck out, it becomes an action on the case.

Rule absolute.

(a) 3 *Dowl. P. C.* 189.

(b) 1 *Har. & Woll.* 525; 4 *Dowl. P. C.* 281.

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DEBT for penalties, under the 3 & 4 Will. 4, c. 101,¹ s. 19 (a), (the *Gravesend Pier Act*). The declaration stated, that one *W. A. C.* was appointed, by the mayor, aldermen, and burgesses of the villages and parishes of *Gravesend* and *Milton*, the clerk for the purposes of the said Act, and one *T. H.* was appointed treasurer for the same purposes, and that the defendant was clerk of the said *W. A. C.*, yet the defendant, not regarding the said Act whilst he had such clerk as aforesaid, officiated for the said treasurer contrary to the said Act. *Plea*, Not Guilty.

At the trial, before *Patteson, J.*, at the last Summer Assizes for the county of *Kent*, the plaintiff put in evidence the corporation accounts, containing the following item :—"Salary to *H. Newton*, as assistant treasurer," and also an admission, by the defendant, on the trial of an appeal that he was "assistant treasurer." There were also several receipts, for pier-tolls, filled up by the defendant, and signed by the treasurer, and one receipt was signed by the defendant, as assistant treasurer. It was submitted, that the corporation had power, under the 18th section (b), to appoint the defendant assist-

imposed on the clerk or his partner, or clerk who shall in any manner officiate for the treasurer:—*Held*, that the corporation had no power to appoint an assistant treasurer; but where they had appointed the clerk of the clerk to that office, it was a question for the jury whether he had acted *bonâ fide*, believing himself an independent officer, or colourable in evasion of the Act.

The *Gravesend Pier Act* (3 & 4 Will. 4, c. 101, s. 18.) empowers the corporation to appoint clerk, treasurer, and such other officers or assistants as they may think necessary for the purposes of the Act. Section 19, prohibits the corporation from appointing the clerk, in the execution of the Act, the treasurer for the purposes of the Act, and a penalty is

(a) "Provided always, and be it further enacted, That it shall not be lawful for the said mayor, jurats, and common councillors, to appoint the person who may be appointed the clerk in the execution of this Act, and the said recited Act, or the partner of any such clerk, or the clerk or other person in the service or employ of any such clerk or of his partner, the treasurer for the purposes of this Act and the said recited Act, or to appoint any person who may be appointed treasurer, or the partner of any such treasurer, or the clerk or other person in the service or employ of any such treasurer or his partner, the clerk to the said mayor, jurats, and common councillors, for the purposes of this Act and the said recited Acts; and, if any person shall accept both the offices of clerk and treasurer, for the purposes of this Act and the said recited Act, or if any person, being the partner of any such clerk, or the clerk or other person in the service or employ of any such clerk or of his partner, shall accept the office of treasurer, or shall act as deputy of the treasurer, or in any manner officiate for the treasurer, or being the partner of any such treasurer, or the clerk or

other person in the service or employ of any such treasurer or of his partner, shall accept the office of clerk, in the execution of this Act and the said recited Act, or shall act as deputy of such clerk, or in any manner officiate for such clerk, every such person so offending, shall for every such offence, forfeit and pay the sum of 100*l.* to any person who shall sue for the same."

(b) "And be it further enacted, That it shall be lawful for the said mayor, jurats, and common councillors, from time to time, to nominate and appoint one or more person or persons to be their clerk or clerks, treasurer or treasurers, collector or collectors of the rates, tolls, and duties, to be levied, raised, and received under or by virtue of this Act, and such other officer or assistants, as the said mayor, jurats, and common councillors shall think necessary for the execution of the several purposes of this Act and the said recited Act; and the said mayor, jurats, and common councillors shall and may, from time to time, remove or suspend any of such officers, as they shall see occasion, and appoint another or others in the room or instead of any of them who shall be so removed or suspended, or who

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ant treasurer, and, therefore, he could not be considered as officiating for the treasurer, but discharging the duties of an independent officer. The learned judge nonsuited the plaintiff, reserving leave to move to set aside the nonsuit and enter a verdict for the penalty, if the Court should be of opinion that the plaintiff was entitled to recover.

Thesiger, in *Michaelmas Term* last, obtained a rule accordingly ; against which

D. Pollock and *Brett* shewed cause.—By the 18th section, the corporation have the power of appointing a treasurer, collector, and such other officers and assistants as they may think necessary. The office of assistant treasurer must be considered as a distinct subordinate office. The mere receipt of the money is not necessary evidence that the defendant officiated for the treasurer. But even if the corporation could not legally appoint an “assistant” to the treasurer, they have the power of appointing a treasurer or treasurers, or such other officer as they may think necessary ; and here they have appointed an officer, independent of the treasurer, and who receives a salary from the corporation. It is analogous to the case of an assistant overseer, appointed under the 59 *Geo. 3*, c. 12, s. 6.

Thesiger and *Platt*.—This case falls within the mischief which the Statute intended to guard against. The corporation have no power to appoint an assistant treasurer under the 18th section, though they may appoint two treasurers ; and the absence of any proof of such appointment is strong evidence that they have not done so. But, assuming that he has been appointed by the corporation, he cannot be considered as an independent officer, since the corporation have no power to appoint an assistant treasurer, *Ex parte Harvey* (c). An assistant overseer is so styled in the 59 *Geo. 3*, c. 12, s. 6 ; but the term “assistant treasurer,” does not occur in this Act. Here the defendant has performed the duties belonging to the treasurer, and must be considered as having officiated for him within the terms of the 19th section.

Lord ABINGER, C. B.—If we were to direct a verdict to be entered for the plaintiff, it would exclude an inquiry into a point which we are disposed to think the learned judge ought to have left to the jury. If the learned judge had left the question to the jury, and they had found for the plaintiff, we think it would have been a proper verdict ; but as the learned judge was interrupted by a question on the construction of the Act, the question of *bona fides* was never submitted to them. I think that there was evidence that the defendant did officiate as treasurer, and that he did so knowingly ; and that if he acted under an appointment, as assistant treasurer, it was a mere evasion of the Act of Parliament. It is, however, for the jury to say whether he acted *bonâ fide*, and under a mistaken notion of his authority ; they might think that he could not be guilty of evading the Statute, when his conscience

shall die, neglect, refuse, or decline such offices, or become incapable of acting therein ; and out of the moneys to be raised by the said recited Act, and this Act, to pay such wages, salaries, or

other allowances to the said officers respectively, as to the said mayor, jurats, and common councillors shall seem reasonable.”

(c) 7 *Adol. & E.* 739.

was not involved. Under these circumstances, the rule ought to be absolute for a new trial, not to enter a verdict for the plaintiff.

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PARKER, B.—I am of the same opinion.—The learned judge, at the trial, seems to have been of opinion, that it was in the power of the corporation of *Gravesend* to appoint, as a substantive officer, an assistant treasurer, which assistant treasurer would act upon his own account, and would be responsible in his own person for all the monies he might receive; and, acting upon that opinion, he nonsuited the plaintiff. If that view had been correct, I should have concurred in the nonsuit, because if the corporation had power to appoint an assistant treasurer, as a substantive officer, there was no proof that the defendant acted in any other capacity. But, it appears to me, attentively considering the Act, that the corporation have no power to appoint an assistant treasurer; if so, they would be enabled to commit a complete fraud upon the Act, and altogether to defeat its object. The corporation may appoint any number of treasurers which, in their discretion, they may think fit, and also such other officers or assistants as they may think necessary for carrying into execution the purposes of the Act. The word *assistant* seems to me to mean simply an officer, and not an assistant to another officer; and the corporation have no right to give an assistant a salary, except as assistant to themselves. The Act goes on to say, that the corporation may remove or suspend any of such officers as they shall see occasion, and appoint another, or others, in the room of any of them who shall be so removed, &c., and out of the monies to be raised by the Act, to pay such wages, salaries, or other allowances to the said officers respectively, as to the said mayor, &c., shall seem reasonable. Therefore, they have no power to give any salary to any assistant, except as synonymous to an officer. Then the question arises whether, in this case, the defendant is guilty of having officiated for the treasurer. I think he cannot be so considered, unless he knowingly, and wilfully, executed any part of the duty cast upon the treasurer. But if he acted *bonâ fide*, under the belief that he was a substantive officer, appointed by the corporation, he would not be liable to the penalty. It was a question for the jury, whether this was a mere contrivance, on the part of the corporation, to appoint an assistant to the treasurer; if so, it is impossible to suppose that the defendant was not privy to it; and then his purporting to act as an independent officer would not avail. I think that point ought to have been left to the jury.

ALDERSON, B.—I am of the same opinion. When the learned judge expressed his opinion, as to the fact that the defendant was acting on his own behalf, he expressed an opinion upon that which ought to have been left to the jury; but it would be a strange doctrine to lay down that, because a judge has expressed an erroneous opinion, the Court is to allow a verdict to be entered against the defendant, on the ground, that the jury ought to have found a verdict against him if the judge had asked their opinion. There seems to me abundant evidence to show that this party was officiating for the treasurer; for I concur with the rest of the Court, in thinking that this Act gives no power to the corporation to appoint an assistant to the treasurer. But, nevertheless, the word *assistant*, in the 18th section, may have misled both the corporation and the defendant; and the corporation may have *bonâ*

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fide appointed, and the defendant may have *bonâ fide* acted in that capacity ; if so, he cannot be said to have officiated for another person, when he was acting as a substantive and distinct officer. Although we are of opinion that the corporation had no power, under the Act, to appoint an assistant treasurer, yet, if the jury had come to the conclusion that he acted *bonâ fide*, they ought to have found for the defendant.

Rule absolute for a new trial.

OLIVER v. WOODRUFFE.

An infant cannot execute a cognovit.

To constitute an express naming of an attorney within the 1 & 2 Vict. c. 110, s. 9, it is not necessary that the attorney should be, in the first instance, named by the defendant ; it is sufficient if he afterwards adopts him.

Nor need the attestation state that the attorney was named by the defendant ; it is sufficient if he declare himself attorney for defendant, and state that he subscribes as such.

It is no objection that the cognovit was not read over to defendant, if its nature and effect be explained to him.

WORDSWORTH moved for a rule to shew cause why the cognovit, executed by the defendant in this case, should not be taken off the file and cancelled, and why the appearance entered for the defendant, by Mr. *Haynes*, the plaintiff's attorney, together with the judgment signed upon the said cognovit, and all subsequent proceedings thereon, should not be set aside for irregularity, with costs, and the defendant discharged out of custody. The action was brought to recover the price of boots supplied to the defendant, who was an infant. It appeared, from the affidavits, that after the writ of summons was served, the defendant called upon *Haynes*, the plaintiff's attorney, who then asked him if he would sign a cognovit. The defendant informed *Haynes* that he was not of age, and that the plaintiff knew that to be the fact ; *Haynes* said it was no matter, and that an attorney must witness the cognovit for the defendant, who answered that he did not like to ask any one that he knew ; upon which *Haynes* said, " Very well, then I will get a friend of mine, who lives in the next street, to do it," and added, that he, *Haynes*, would write to, or arrange with, his friend to be in the way at four o'clock of that same day, at which time defendant was to call again. The defendant accordingly went to *Haynes's* office, when he immediately told defendant to go to Mr. *Parrell*, at *New North-street*, just round the corner, at a very short distance from the office, and *Parrell* would come and witness the cognovit. *Haynes* then wrote upon a piece of paper the name and address of *Parrell*, and gave it to defendant, who then went, as directed, to *New North-street*, where the door was opened to him by a person, who said, in answer to defendant's inquiry, that he was *Parrell* ; whereupon defendant said, " I come from *Haynes*," and produced the piece of paper ; *Parrell* immediately said, " Oh, your name is *Woodruffe*," and added, " very well ; I will come directly." The defendant afterwards signed the cognovit for the payment of the debt by instalments, and there was the following provision :—

" I do hereby undertake, not to bring any writ of error, nor file any bill in equity, nor do any other matter or thing to delay the said plaintiff from entering up his judgment, or suing out execution thereupon, as aforesaid. And also, that Mr. *Ambrose Haynes* shall be at liberty to appear for me, for the purpose of entering up judgment herein, in the event of default as aforesaid."

The attestation was as follows :—

" Witness, *William Parrell*, No. 25, *New North-street*, *Red Lion-square*,

attorney, and expressly named for the said *William Woodruffe*, sued as *William Woodrough*, at his request, and I hereby subscribed as, and declare myself to be, attorney for him, having read over and explained to him the nature and effect of this cognovit previous to his execution thereof."

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The appearance entered was as follows :—

" *Ambrose Haynes*, attorney for the plaintiff, appears for the defendant on a cognovit."

The rule was moved upon the following grounds; first, the 1 & 2 *Vic. c. 110*, s. 9, requires the attorney to be named by the defendant; but it was consistent, with the terms of the attestation, that he was not so named; secondly, that it appeared from the affidavits, that the cognovit was not read over to the defendant previously to being signed by him; thirdly, that there was no attorney present named by the defendant; and lastly, that, the defendant being an infant, the cognovit was invalid.

PARKE, B.—You are not entitled to a rule on the two first grounds; all that the Statute requires is, that, in the attestation, the attorney shall declare himself to be attorney for the defendant. He must be named by the party himself; but he need not state that in the attestation. As to the other objection, it is sufficient if the nature and effect of the instrument be explained to the defendant.

A rule having been granted on the two last grounds,

Humfrey shewed cause.—It is not necessary that the attorney should, in the first instance, be named by the defendant; it is sufficient if he adopts the attorney, though originally named by some other person, *Fisher v. Papanicholas* (a). The 9th section of the 1 & 2 *Vic. c. 110*, is the same in terms as the 27th rule of *H. T.*, 2 *W. 4*; the previous decisions are, therefore, applicable to the present case. *Bligh v. Brewer* (b), is in favour of the plaintiff. Then, as to the other point, it is true, that an infant cannot execute a warrant of attorney; but there is no authority to show that he may not give a cognovit. An action may be brought against an infant for necessities; and there seems no reason why he should not confess it, in order to save further expence.

Wordsworth, in support of the rule.—The decisions under the 27th rule of *H. T.*, 2 *W. 4*, cannot govern the present case. The object of the late Act was to prevent imprisonment; and, in order to further that object, the Court will construe the section in the strictest way. As to the other point, there seems no ground for distinction between a cognovit and a warrant of attorney. An infant cannot appoint an attorney; but this cognovit empowers an attorney to enter an appearance for the defendant, which has been done; and as the judgment now stands, there is error on the record.

LOID ABINGER, C. B.—With respect to the question whether an infant can execute a cognovit, we will take time to consider. Upon the other point,

(a) 2 C. & M. 215.

(b) 1 C. M. & R. 651.

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there can be no doubt. The Statute requires an attorney to be employed by the defendant, at his own will and pleasure. The circumstance of the attorney being, in the first instance, named by another, is not material, if the defendant afterwards adopts it. The words of the Statute being conformable to the old rule, the interpretation of that rule must govern the Statute.

PARKER, B.—The case of *Bligh v. Brewer* is precisely in point.

Curr. adv. vult.

The judgment of the Court was delivered by

LORD ABINGER, C. B.—One of the points upon which the rule was granted having been disposed of at the time of argument, we thought it advisable to take time to consider our judgment on the other. On it, we have come to a conclusion adverse to the plaintiff, and are of opinion, that an infant cannot, by law, bind himself by an instrument of this nature. It has been decided, that an infant cannot execute a warrant of attorney; and this case embraces all the principles upon which that decision rests. It is a general rule of law, that a minor cannot do any thing to prejudice himself or his rights; but, in this cognovit, there is an express provision to deprive him of the right of bringing a writ of error. Besides, the minor is made to state an account, and appear by an attorney of the Court, instead of by guardian. Both these acts are in violation of established principles. An infant cannot acknowledge an account stated so as to bind himself; if an action be brought against him, the jury will have to determine the reasonableness of the demand. But, further, this infant is made to appoint an attorney to appear for him in an action to be brought for a certain sum; and, supposing that there was no stipulation in this cognovit to deprive him of the benefit of a writ of error, he might hereafter defeat the proceedings by alleging his minority as error in fact. For these reasons, therefore, that an infant cannot appoint an attorney—cannot state an account against himself, or generally, that he cannot do any act to prejudice his rights, we think this cognovit cannot be supported.

Rule absolute, to set aside the cognovit.

FOSS v. RACINE, LANG, HARRISON, and WILLIAMS.

Where a plaintiff sues in *formâ pauperis*, the defendant is not entitled to set off the costs of the issues found for him.

Semble, that a party cannot be admitted to sue in *formâ pauperis* after the commencement of the suit.

PLATT moved for a rule to shew cause why the Master should not review his taxation. The plaintiff sued in *formâ pauperis*, and had obtained a verdict, on the first issue, against all the defendants, except *Williams*, the defendants succeeding on the other issues. The Master, on taxation, allowed the plaintiff his whole costs on the issue found for him, without deducting the costs on the issues found for the defendants. *Platt* referred to the 11 *H. 7*, c. 12, and 23 *H. 8*, c. 15, and contended, that the plaintiff was not called upon by this application to pay costs, but only not to receive those which he would otherwise be entitled to.

LORD ABINGER, C. B.—If we were to allow the defendant's costs to be set off, it would, in effect, be making the pauper pay costs.

PARKE, B.—A liability to set off can only arise where there is a liability to pay. *Gougenheim v. Lane* (a), expressly decided that the rule of *H. T.*, 2 *W.* 4, c. 74, did not apply to paupers. The officer, in taxing these costs, ought to allow such briefs, witnesses, and fees as if the count on which the plaintiff succeeded had been the only one in the declaration.

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On a subsequent day, the case came again before the Court, on a motion that the Master review his taxation, the sum recovered having been under 5*l*. It then appeared that the plaintiff had been admitted to sue in *formâ pauperis* after plea pleaded, and not at the commencement of the suit, as required by the 23 *Hen.* 8, c. 15, s. 2.

Murphy shewed cause, and referred to *Jones v. Peers* (b), where an order was made *pendente lite*, admitting the plaintiff to sue in *formâ pauperis*, and an application for security for costs previously incurred was not made until nearly two years afterwards, and the Court refused the application.

PARKE, B.—The difficulty is to see how we are to get over the words of the Act, which only enables the plaintiff to sue in *formâ pauperis* before the commencement of the suit. It seems to me, that this plaintiff ought never to have been admitted to sue in *formâ pauperis*; and if so, he is liable to pay costs.

The matter was then compromised, by allowing the defendants their costs up to the time when the plaintiff was admitted to sue in *formâ pauperis*, and by discharging the rule as to the residue.

(a) 1 Gale, 343; 1 M. & W. 336.

(b) M'Clel & Y. 282.

STEWART v. ROGERS and TAYLOR.

THIS was an action on a promissory note against two defendants, and one of them had let judgment go by default.

In *assumpsit*, if one defendant let judgment go by default, the other may, nevertheless, move for judgment, as in case of a nonsuit.

Keating moved for judgment, as in case of a nonsuit, and submitted that the motion might be made. In *Murphy v. Doulan* (a), it was held, that after judgment, by default against one of two defendants, the plaintiff might elect to be nonsuited on the trial of an issue joined by the other defendant. And in *Jones v. Gibson* (b), a similar application was made by one of two defendants; and the matter having been referred to the Master, he reported that, as the plaintiff might have been nonsuited, if the cause had gone down to trial, and either of the defendants had appeared by his counsel in like manner, one defendant was entitled to judgment, as in case of a nonsuit.

Palmer shewed cause.—In *Harris v. Butterley* (c), it was held, in trespass against several defendants, that if any suffer judgment by default, the plaintiff

(a) 5 B. & C. 178.
 (b) 5 B. & C. 768.

(c) Cooper, 483; 8 D. & R. 592.

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need only give evidence to affect the rest, and that the plaintiff could not be nonsuited. *Hannay v. Smith* (d) is to the same effect.

PARKE, B.—Those were actions of trespass, in which the jury would have, at all events, to assess the damages against the defendant who has suffered judgment by default; but it is different in *assumpsit*. As a regular nonsuit might have taken place, I think the motion may be sustained.

A *stet processus* was recommended and agreed to.

(d) 3 T. R. 662.

LEAF v. LEES.

In a count, on an account stated, it is not necessary to allege any time when the account was stated.

DEBT. The declaration stated, that the defendant, on the 20th day of *August*, in the year of our Lord 1838, was indebted to the plaintiff in the sum of 50*l.*, for goods before then sold and delivered, and in the further sum of 50*l.*, for money found to be due from the defendant to the plaintiff, “upon an account *before then* stated between them.”

Special demurrer to the latter count, on the ground that no time was alleged on which the account was stated.

Ball, in support of the demurrer.—The form here used differs both from the old form, and from that given by the rule of *T. T.*, 1 *W.* 4. *Fergusson v. Mitchell* (a), is an authority in point; and that decision was recognized in *Spyer v. Thelwell* (b), and in *Lane v. Thelwell* (c).

Haynes, in support of the count.—*Fergusson v. Mitchell* cannot be considered as deciding the point, as judgment was there given on the ground that the demurrer was too large. Time is not necessarily a material allegation; but if it be so, the date in the preceding count may be considered as incorporated into the latter count. *Lane v. Thelwell* decided, that it was unnecessary, in a count for goods sold, to allege any time when they were sold; and it would merely create an artificial distinction to establish a different rule, with respect to an account stated.—[Lord Abinger, C. B.—If goods were sold at different times, it may be alleged that the defendant, on a particular day, was indebted; but the statement of an account is one single fact only.]—If it be necessary to allege time in an account stated, because the count is in terms confined to a single transaction, it would be equally necessary in a count for goods sold and delivered, where the subject matter is confined to a single transaction, as, for instance, a horse sold and delivered. The new rules were not intended to introduce any alteration in the principles of pleading, but only to compel the adoption of more concise forms. Before the new rules, many unnecessary statements of time and place were introduced. This question was lately before the Court of *Queen's Bench*, in *Bingley v. Durham* (d); and that Court held good a form similar to the present.

(a) 1 Gale, 346; 2 C. M. & R. 687.

(b) 1 Gale, 348; 2 C. M. & R. 688.

(c) 1 Gale, 430; 1 M. & W. 140.

(d) Since reported in *Per. & D.* 58.

Bull. in reply, cited *Higgins v. Highfield* (e), and *Dennison v. Richardson* (f).

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Per Curiam.—It is of great importance that the Courts should be uniform in their decisions. We will, therefore, inquire respecting the case referred to in the *Queen's Bench*.

Cur. adv. vult.

Lord ABINGER, C. B.—This was a special demurrer to an account stated, on the ground that no time was specified. If the statement of time was unnecessary, this form would be insufficient; but the Court of *Queen's Bench* have lately decided, that it is not necessary to allege a time when the account was stated; and we concur in that decision.

Judgment for the plaintiff.

(e) 13 East, 407.

(f) 14 East, 291.

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[Hil. Vacation.]

HILARY VACATION, 1839.

BRYAN and others v. NIX.

T. a corn-factor, was in the habit of sending oats by a canal from Longford to Dublin, to the care of his agents at the latter place, to be forwarded by them to Liverpool or London. On the 2d February, he sent to the plaintiffs, his factors, two receipts signed by the masters of two canal boats, Nos. 604, and 54 dated 31st January, resembling bills of lading in their language, and expressing that two cargoes of oats had been shipped at Longford for the plaintiffs. At the date of these receipts, boat No. 604 was completely loaded, and boat 54 partially so. T., at the same time informed

TROVER for oats. *Pleas: first*, Not Guilty; *second*, that the plaintiffs were not possessed of the goods and chattels, as in the declaration mentioned.

At the trial, before *Williams, J.*, at the *Liverpool Summer Assizes, 1837*, the following facts appeared: the plaintiffs were corn-factors at *Liverpool*, trading under the firm of *Bryans, Herd, and Co.*, and the defendant was a corn-factor in *London*, carrying on business under the firm of *Forster and Nix*. *Myles Tempany* was a corn-dealer, residing at *Longford, in Ireland*, and dealing under the firm of *Gethins and Tempany*, and was in the habit of consigning oats, both to the plaintiffs in *Liverpool*, and the defendant in *London*. Oats so consigned were put on board of boats or barges at *Longford*, and conveyed by the *Royal Canal* to *Dublin*, whence they were forwarded to *Liverpool* or *London*, as the case might be. *Myles Tempany* had a brother residing in *Dublin*, who was employed by him in the purchasing and shipping of corn. *J. and D. Delany*, of *Dublin*, were also employed by *Myles Tempany*, as his ship-brokers, to procure vessels for the conveyance of corn from *Dublin* to *England*. On the 2d February, 1837, *Myles Tempany* transmitted to the plaintiffs at *Liverpool* two documents, signed, at *Longford*, by the master or steersman of the respective boats, Nos. 604 and 54. The following is a copy of one of the documents:—

“Shipped in good order and condition by *Gethins and Tempany*, boat No. 604, whereof is master for this present voyage, *Thomas Murtagh*, and now riding at anchor in the canal harbour, *Longford*, and bound for *Dublin* 480 barrels of oats, being marked and numbered, as in the margin, to be delivered in like good order and condition at the aforesaid port of *Dublin*, the dangers of sea, fire, rivers, and navigation of whatever nature and kind excepted, unto Messrs. *John and Thomas Delany*, in care for, and to be shipped for Messrs. *Bryans, Herd and Co., Liverpool*, with primage and average accustomed

the plaintiffs that he had valued against them on account of these cargoes. On the 7th February, the plaintiffs returned for answer, that they had accepted the bills. These bills were afterwards paid by them. The defendant, who was the creditor of T., sent an agent to *Longford*, for the purpose of obtaining from T. some oats, that had not arrived according to agreement. On the 6th February, T. being pressed by the defendant's agent, agreed to transfer to him the cargoes of the two boats: and on the 9th February, sent from *Longford* to the defendant's agent, who was then at *Dublin*, a boat receipt similar in form to those of the plaintiffs', entitling the defendant to the cargo of the boats Nos. 604 and 54. The agent received these receipts on the 9th February, and on the arrival shortly after of the boats Nos. 604 and 54, took possession of their cargoes, which were afterwards sold by the defendant.

Held, First, that the plaintiffs had a complete title to the cargo of boat No. 604, at least on the 7th February, the day of their accepting the bill. *Secondly*, that as on the 31st January, there were no oats on board the boat No. 54, no specific chattels were held for the plaintiffs. That no appropriation took place until the 9th February, when the master signed the boat receipts for the oats then on board boat 54, and thereby made himself the defendant's agent for the purpose of holding these oats. That the plaintiffs were therefore entitled to the cargo of boat 604, and the defendant to that of boat 54.

Quære, whether receipts for goods given by the master of a canal boat, and in form resembling bills of lading, possess all the properties of those instruments.

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judgment is *primâ facie* final, and confers a *primâ facie* right. The cases cited on the other side, in which it appeared that the party was not within the jurisdiction of the foreign Court at all, have no application here; for it does not appear that the defendant was not within the jurisdiction before the commencement of the suit.—[*Watson*.—The replication avers that the defendant was not within the jurisdiction “before or at the time of the commencement of or at any time during the proceedings of the said Court.”]—If the Court conceives that makes any difference, I would crave leave to amend by traversing that allegation, instead of demurring to the replication.—[*Tindal*, C. J.—At present I have a strong opinion that the plea is bad; the better way would be to strike out the words “before or” in that allegation; then the replication will stand that the defendant was not within the jurisdiction at the commencement of the proceedings, or at any time afterwards; argue it upon that supposition.]—The former argument will then still apply. In *Becquet v. M'Carthy*, although the defendant was absent during the whole of the proceedings, yet, as he had formerly resided there, and the monition had been duly served, according to the practice of the foreign Court, upon the *procureur du roi*, the judgment was upheld. *Arnott v. Redfern* (t), *Obicini v. Bligh* (u), and *Burrows v. Jemino*, shew that foreign judgments are entitled to credence, by the comity of nations. Supposing that the highest effect that can be given to a foreign judgment is that it is equipollent with an award, still it is binding upon the parties until impeached. With regard to the estoppel, all that is contended for is, that the plaintiff is estopped from disputing the effect of the foreign judgment. It is contended, on the other side, that an estoppel must be mutual, and that is undoubtedly true of strict estoppels; but there are estoppels, known to the common law, where that rule does not apply: such, for instance, as the rule that a party shall not avail himself of his own wrong.

The first general proposition, therefore, is, that a regular foreign judgment is a bar to an action here, that the rights of parties are thereby changed, and that it is final and conclusive between them. But, secondly, if not absolutely final, still it is to be considered as valid until impeached.

TINDAL, C. J.—It appears to me, that the fifth plea is substantially bad. This is an action to recover damages for seizing the plaintiff's ship and goods on board thereof; and the fifth plea states, in substance, that the plaintiff brought an action against the present defendant in the Colonial Court of *Sierra Leone*, and there recovered judgment against him.

The broad question, therefore, is, whether this can be considered as a plea of judgment recovered, so as to deprive the plaintiff of his right of action in our Courts, or whether it is to be looked upon in the light of a mere contract between the parties. It is admitted, that there is no case to shew that a judgment, obtained in a Vice-admiralty Court abroad, is as valid as a judgment obtained here. In the case of a judgment here, the party who obtains it has a remedy of a higher nature than by suing upon his original cause of action; he may issue execution; and it would encourage needless litigation if a party, thus situated, were allowed to sue again upon his original cause of action. His remedy by action is merged in that higher remedy. Now, a

(t) 3 Bing. 355; 11 Moo. 209; 2 C.
& P. 88.

(u) 8 Bing. 335; 1 Moo. & Sc.
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Vice-admiralty Court abroad, belonging to the crown, is not a Court of record; a judgment, therefore, obtained in such a Court, cannot be put upon a higher footing than if it had been obtained in the common law Courts of record in the colonies; but the only mode of obtaining execution on such a judgment is by a new action, in which the judgment would be evidence; and that marks the leading distinction between a foreign judgment and a judgment obtained here. Formerly, doubts were entertained whether or not such a judgment was conclusive; and the question was a good deal discussed by Lord C. J. Eyre, in *Philips v. Hunter (v)*; but the ground I take is this, if

foreign judgment does not alter the nature of the parties' rights, why should the plaintiff be deprived of his right of resorting to his original cause of action. He has the option to do so, or to bring *assumpsit* on the foreign judgment. This was the opinion of Bayley, J., in *Hall v. Odber*, who, in giving judgment, says, "This, being only a foreign judgment, did not extinguish or merge the plaintiff's simple contract debt, which can only be done by converting it into a debt of a higher nature: it is only evidence of the debt." In that case, an action had been brought by the plaintiff in a foreign Court, and he obtained a judgment with a stay of execution for six months, and it was held that the plaintiff might still sue the defendant in this country upon the original cause of action, and use the judgment in the foreign Court as evidence in his favour, which would be quite inconsistent with the supposition that the original cause of action was extinguished between the parties.

These, therefore, are the general grounds upon which this case stands; but let us look further to the state of the record. The plaintiff, in his replication, shews matter by which he seeks to avoid the effect of the plea, and to shew that the foreign judgment is inoperative. For, supposing that the alteration has been made as suggested by the Court (which is the most favourable way of looking at the case for the defendant), the effect of the replication is, that the defendant was out of the jurisdiction of the Court at the time of the commencement of the suit down to the period of its termination, and that there was no agent, or any other person, on his behalf, on whom the process of the Court could be served; and this allegation is not answered by shewing the existence of any law in the colony by which, under such a state of facts, a judgment, obtained against a party, would be good and valid there. What then would be the condition of the plaintiff if we were to hold that he was ousted of his right to sue upon the original cause of action? If he sued upon the judgment, he would be turned round and told that he ought to sue upon the original cause of action. For these reasons, and upon the authority of *Plummer and Woodburne*, I think, upon the fifth plea, there must be judgment for the plaintiff.

VAUGHAN, J.—I am of the same opinion. I consider that Lord Ellenborough's judgment, in *Hall v. Odber*, is decisive in favour of the plaintiff.

BOSANQUET, J.—I am of the same opinion. In this case, to a count in trover, the defendant has pleaded a judgment, obtained by the plaintiff against him in a foreign Court, as a bar, and it is argued, by that judgment, the nature of the cause of action was changed. In the first place, the Vice-admiralty

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and not vendees. The property in the boats, Nos. 604 and 54, vested in the plaintiffs on the 7th *February*, the date of their acceptances: whereas the boat receipt sent to *Walker* was not dispatched from *Longford* till the 9th *February*, and did not reach him till the 11th, until which day he could have no right whatever to the cargoes.—[*Parke*, B.—The defendant's boat receipt was sent in pursuance of a prior engagement; and if it was capable of transferring the property at all, the defendant's title was completed on the 9th *February*, at which time the letter was put into the post, and the shipper had lost the power of recalling it.]—At all events, the title of the defendant is posterior to that of the plaintiffs. With regard to boat No. 54, which was not completely loaded at the date of the plaintiffs' bills of lading, the jury have, in effect, found that the cargo was sufficiently ascertained and identified to vest the property in the plaintiffs.—[*Parke*, B.—The written contract states, that the oats were actually shipped; would the shipper have been liable to an action if he had substituted other oats for those which he said he had put on board?—He would.—*Alderson*, B.—The jury have, in effect, found nothing more than that *Myles Tempany* intended to ship the oats.]—But suppose the cargo of boat No. 54 not to be sufficiently designated at the date of the plaintiffs' bills of lading, still they acquired a title to the cargo by estoppel. If a party makes a lease, having at the time no interest in the land, but afterwards acquires an interest, the lease is good against him by estoppel, *Rawlyn's Case* (e). *Doe*, d. *Christmas v. Oliver* (f), *Helps v. Hereford* (g). So in the present case, *Myles Tempany*, the shipper, who told the plaintiffs he had shipped the oats, is estopped, as soon as the oats are actually shipped, from saying that they do not belong to the plaintiffs. The same rule holds with regard to *Clinch*, the master of the boat. That being the case, the defendant, who claims under the shipper or the owner of the boat, is estopped likewise.

Kelly, Alexander, and Martin, contra.—These receipts, given by the masters of the boats, are not bills of lading. A bill of lading has acquired a specific character by the custom of merchants, and is employed to transfer such property only as is conveyed upon the high seas, estuaries, or large navigable rivers. If these receipts in question are to have the effect of bills of lading, there is no reason, in principle, why a carrier's receipt should not be considered as having the same effect. The defendant contends, that putting goods on board a boat, writing a letter, enclosing boat receipts, and drawing a bill of exchange, on the faith of the cargo, do not vest the property in the plaintiffs. The shipper, *Myles Tempany*, was entitled to obtain the goods back after they had been put on board. *Hall v. Griffin* does not apply, because the defendants held the goods for some person, and having promised to deliver them to the plaintiff, their promise attached on the arrival of the goods. In *Williams v. Everett* (h), there was no promise, and, consequently, the defendants were held not liable to the plaintiff. Here there has been no assent on the part of *John Tempany*, the holder of the oats.—[*Parke*, B.—The question is, whether the property was not transferred previously.]—If the shipper and the plaintiffs had stood in the relation of vendor and vendees, the property might have passed to the latter; but they were principal and

(e) 4 Co. Rep. 52.
(f) 10 B. & Cress. 187.

(g) 2 B. & Ald. 242.
(h) 14 East, 582.

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factors, and, therefore, the plaintiffs could claim only by virtue of a lien which would not give them a right here, as they had not the actual possession of the goods, *Kinloch v. Craig* (i). *Haille v. Smith*, was not the case of principal and factor. Again, wherever property has been held to vest under circumstances similar to the present, there has been something equivalent to a purchase, as, for instance, a regular bill of lading duly indorsed. That was the case in *Haille v. Smith*, and in *Anderson v. Clark* (j). *Berkley v. Watling* (k), is also an authority in favour of the defendant.—[*Parke, B.*—Consider the question as if these boat receipts were merely carrier's receipts. If the intention of the shipper had been, that the plaintiffs should hold the oats merely as factors, the consignment would have been to *Delany*, as agent for the shippers; but the effect of the whole transaction is, that if the plaintiffs accept the bills, the boat owners are to hold the oats as their agents; and if it was intended that the plaintiffs should take them as a special property, they are not to be in a different situation, because they happen to be factors also.]—The shippers might be estopped from saying that the goods did not belong to the plaintiffs, but they were not so estopped as against the defendant. If the bill of exchange had become due, and had been dishonoured, the shipper might have stopped the goods *in transitu*. That shews that no property passed to the plaintiffs, but that their remedy is by an action against the shipper for a breach of contract. In *Bruce v. Wait* (l), a bill of exchange was accepted by the consignee of goods, on the faith of a consignment; but it was held that the property did not pass to the consignee.—[*Parke, B.*—The goods were not put on board at the time of the proposal to accept the bill; nor was there any declaration that the master of the vessel held them for the benefit of the consignee.]—In the case of *Nichols v. Clent* (m), which is similar to the present, it was held that no property passed to the consignee.—[*Parke, B.*—In that case there was no intention of creating any lien until delivery.]—If the Court should determine in favour of the plaintiffs, it will be the first case in which it has been decided that an agreement, arising from letters, will vest property without a bill of lading.

Cur. adv. vult.

The judgment of the Court was afterwards delivered by

PARKE, B.—The question in this case is, whether the property in the oats, on board two boats, No. 604, and No. 54, or either of them, were vested in the plaintiffs at the time the defendant took possession of those oats. We think the property in the former boat was in the plaintiffs; in the latter, not. The facts of the case, necessary to its administration, may be very shortly stated. *Myles Tempany*, a corn merchant, at *Longford*, who employed the plaintiffs as his factors at *Liverpool*, shipped on board the boat No. 604 a full cargo of oats and took a bill of lading, or boat receipt, for them, signed by the master, bearing date the 31st of *January*, 1837, whereby he acknowledged the receipt of the oats on board, deliverable in *Dublin* to *J. and T. Delany*, in care for and to be shipped to the plaintiffs in *Liverpool*. On the same day he

(i) 3 T. Rep. 119.

(j) 2 Bing. 20.

(k) 7 Ad. & Ell. 29; Will., Woll. & Dav. 429.

(l) 1 Mur. & Hurl. 339; 3 M. & Wels. 15.

(m) 3 Price, 547.

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procured from the master of another boat, No. 54, a bill of lading, or receipt, for 530 barrels, but no oats were then on board that boat, although a cargo was prepared for that purpose. On the 2d of *February*, *Tempany* wrote to the plaintiffs a letter, inclosing both the instruments, and stating that he had valued on the plaintiffs for 730*l.* against those oats; on the 7th, the plaintiffs received this letter, and accepting the bill of exchange, and returned it to *Tempany*, who received it on the 9th. In the meantime, the defendant, who was a creditor of *Tempany's* to a considerable amount, sent over Mr. *Walker*, an agent, to *Longford*; *Walker* arrived on the 6th, and pressed him for security. *Tempany* consented on that day to give him an order, addressed to *Tempany's* brother, his agent, in *Dublin*, desiring him to deliver to *Walker*, for the defendant, the cargo of boat 604, which had sailed for *Dublin*, and for other cargoes, including that of boat No. 54 (which was stated to be 550 barrels), and also all that was in *Tempany's* store in *Dublin*. The boat 54 was then partially loaded, and *Tempany* promised to send the boat receipt for it to *Walker*. The loading was completed on the 9th, and the boat receipt, or bill of lading, for 550 barrels, which was on board, signed by the master, was transmitted to *Walker*, to whom the cargo was made deliverable, and he received it the next day. The boats were both hired by *Tempany*, and the men paid by him. *Walker*, on the 8th, procured an agreement from *J. Tempany*, in *Dublin*, to hold the oats for him when they arrived, and he afterwards got possession of the whole under legal process. It was contended that, under these circumstances, the property in neither cargo vested in the plaintiffs; first, because the instruments were not regular bills of lading, and could give no title; and secondly, if they were, they could not operate to give the plaintiffs a title, because they, being factors, could acquire no lien without actual possession. We think it unnecessary to decide whether the instruments were regular bills of lading, so as to have all the properties which the custom of merchants has attached to those documents; and we need not say whether, like bills of lading they are the symbols of property, so that their transfer by indorsement is equivalent to an actual delivery of the goods, which they represent in specie, nor whether they have the privileges which, by the factor's act, are given to such instruments. These are matters wholly collateral to the present inquiry. The true question here is, what is the meaning and effect of the two documents, by whatever name they are called, coupled with the letter from *Tempany*, of the 2d of *February*, followed by the acceptance of the plaintiffs of *Tempany's* draft. It seems to us to be clearly this, that *Tempany* agrees that the oats therein specified shall be held from that time by the boat masters for the plaintiffs in their own right, provided they accept the bill as a security for the payment; that the masters agree so to hold them, and that, by the plaintiffs' assent, and acceptance of the bill, the conditional agreement becomes absolute, and the transaction is, in effect, the same as if *Tempany* had deposited the goods with a stakeholder, who had assented to hold them for the plaintiffs, in order to indemnify them. As evidence of such a transaction, it is wholly immaterial whether the instruments are bills of lading or not, and it might easily be proved through the medium of carrier's, or wharfinger's receipts, or any other description of document, or by correspondence alone. If the intention of the parties to pass the property, whether absolute or special in certain ascertained chattels, is established, and they are placed in the hands of a depository, no matter whe-

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ther such depository be a common carrier or ship master employed by the consignor, or third person; and the chattels are so placed on account of the person who is to have that property, and the depository attests it, it is enough; and it matters not by what document this is effected, nor is it material whether the person who is to have the property be a factor or not, for such an agreement may be made with a factor as well as any other individual. In the present case, we are of opinion, that this is satisfactorily made out, with respect to the first boat load; and the fact, that the instrument signed by the master, specifies that the goods are to be carried to and delivered at *Dublin* to an agent of the plaintiffs, is decisive to show that the plaintiffs are to take immediately in their own right, and are not merely consignees of *Tempany*, who are to have their lien when the goods arrive, as factors. And this case is distinguishable, on this ground, from *Kinloch v. Craig*, *Bruce v. Wait*, and *Nichols v. Clent*, in none of which were there any documentary or other evidence to prove that the intention of the consignors was to vest the property in the consignee from the moment of delivery to the carrier; and the case resembles that of *Haille v. Smith*, where the bill of lading, being transmitted for a valuable consideration, operated as a change of property *instantly*, when the goods were shipped; and it is also governed by the same principle, upon which I know that of *Anderson v. Clark* was decided, where a bill of lading, making the goods deliverable to a factor, was, upon proof from correspondence of the intention of the principal to vest the property in the factor, as security for antecedent advances, held to give him special property the instant the goods were delivered on board, so as to enable him to sue the master of the ship for their non-delivery. In our opinion, therefore, the plaintiffs had a complete title to the cargo of the boat 604, at least, on the 7th of *February*, when they complied with the consideration, by accepting the bill, and, before the 7th, no other title to these oats intervened, for the order to deliver them, given to *Walker* on the 6th, was clearly executory only. But the claim of the plaintiffs to the cargo of boat 54, stands on a very different footing. At the time of the agreement, proved by the bill of lading, or boat receipt, of the 31st of *January*, to hold the 530 barrels therein mentioned, for the plaintiffs, there were no such oats on board, and, consequently, no specific chattels which were held for them. The undertaking of the boat master had nothing to operate upon; and although *Myles Tempany* had prepared a quantity of oats to put on board, those oats still remained his property; he might have altered their destination, and sold them to any one else: the master's receipt no more attached to them, than to any other quantity of oats belonging to *Tempany*. If, indeed, after the 31st of *January*, these oats so prepared, or any other like quantity, had been put on board, to the amount of 530 barrels, or less, for the purpose of fulfilling the contract, and received by the master as such, before any new title to them had been acquired by a third person, we should have probably held that the property in these oats passed to the plaintiffs; and that the letter and receipt, though it did not operate, as it purported to do, as an appropriation of any existing specific chattel, at least operated as an executory agreement by *Tempany*, and the master and the plaintiffs, that *Tempany* should put such a quantity of oats on board for the plaintiffs, and that when so put, the master should hold them on their account; and when that agreement was fulfilled, but not otherwise, they would become their property. But before the complete quantity

of 530 barrels was shipped, and when a small quantity of oats only was loaded, and before any appropriation of oats to the plaintiffs had taken place, *Tempny* was induced to enter into a fresh agreement with the defendant to put on board, for them, a full cargo for No. 54, by way of satisfaction for the debt due to them, for such is the effect of the delivery order of the 8th, and the agreement with *Walker* of the same date, to send the boat receipt for the cargo of that vessel. Until the oats were appropriated by some new act, both contracts were executory: on the 9th, this appropriation took place by the boat receipt for the 550 barrels then on board, which was signed by the master, at the request of *Tempny*, whereby the master was constituted the agent of the defendant to hold these goods; and this was the first act by which these goods were specifically appropriated to any one. The master might have insisted on *Tempny* putting on board oats to the amount of the first bill of lading on account of the plaintiffs; but he did not do so. It is proper, however, to notice the very ingenious argument used, on the part of the plaintiffs, founded on the doctrine of estoppel, as applied to real estate. If a man, by indenture, demise a certain manor to *A.*, which he had not, and then purchases the manor, and afterwards sells or demise it to *B.*, the first lease operates against the purchaser and second lessee; and by analogy to this case, it is contended that the first bill of lading was good for the plaintiffs by estoppel against the master and consignor, and also against the defendant, who claims that cargo which was put on board under the consignor. But this analogy does not hold. In the case of real property, the lease is a conclusive admission by the lessor, that he had a title to a specific estate demised which binds a subsequent purchaser of that estate. Here the bill of lading is a conclusive admission only, that some oats, amounting to the specific quantity, was on board. In the former case, the estate is identified and ascertained at the time of admission; in the latter, no property exists to which the admission applies, for no oats were on board; and they are not otherwise ascertained, than by the statement that they were on board; and the person who afterwards purchased any oats from the consignor, may as well be said to purchase those to which the estoppel relates, as he who purchases those which were afterwards put on board. And, besides, it may well be doubted whether the doctrine of estoppel applies to personal chattels at all, so as to bind subsequent purchasers of them. For these reasons, we think that the plaintiffs are entitled to the first cargo of oats, but not to the other; and the rule must be discharged, as to the boat 604, and the verdict reduced by the value of boat 54.

Rule absolute to reduce the verdict.

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certain reasonable reward to the defendants, in that behalf; and thereupon it became and was the duty of the defendants, safely and securely to carry, and convey, and deliver, for the plaintiff, at *Birmingham*, the said horses of the plaintiff. *Breach*, that the defendants, not regarding their duty in that behalf, did not use due or proper care in and about the carriage and conveyance of the horses of the plaintiff from *Liverpool* to *Birmingham*, but took so little, and such bad care, in and about the carrying and conveying the horses of the plaintiff, and in conducting, managing, and directing their, the defendants', carriages, in and upon and along the said railway, that the carriages which contained the said horses of the plaintiff, were then thrown, and cast with great force and violence, off and from the said railway, and over and down a certain embankment and bank, down to and upon the ground, and there were crushed and broken to pieces, and thereby one of the horses was killed, and the residue of the horses were greatly bruised, lacerated, cut, strained, and injured, and deteriorated in value, and became wholly useless to the plaintiff, whereby he was deprived of the gains and profits which he would have acquired, to the damage, &c.

Pleas: first, Not Guilty; *secondly*, that the defendants did not receive from the plaintiff the horses, or any of them, to be safely and securely carried and conveyed by the defendants, in and upon the said carriages, or by the said railway, from *Liverpool* to *Birmingham*, and there to be safely and securely delivered for the plaintiff, in manner and form as the plaintiff hath, in that behalf, alleged.

At the trial, before *Tindal*, C. J., at the last Summer Assizes, for the county of *Warwick*, it appeared that the plaintiff, who was a horse dealer, at *Northampton*, applied, on the 13th *February*, at the booking-office of the defendants, at *Liverpool*, to have some horses carried from thence by the railway to *Birmingham*; nine horses were accordingly booked, and 10*l.* 10*s.* paid for their carriage, to go by a train from *Liverpool* at half-past four in the afternoon. They left, at the appointed time, with the plaintiff's son in attendance upon them, having been placed in a caravan, constructed for the purpose, on four wheels, and adapted to the railway. The train proceeded safely until a few miles from *Birmingham*, when, as it was proceeding at about the usual rate, the engine was suddenly thrown off the rails, in consequence of coming in contact with a horse which had strayed from an adjoining field, and laid down upon the railway. The engine tender, and the three horse-boxes were thrown off the rails, and, running down the embankment into the adjoining field, were instantly overturned. One of the horses was killed upon the spot, and the rest more or less injured. It appeared that some labourers, in the employ of the company, had been working at a culvert or drain, and had taken down some part of the fence which separated the field, from which the horse had strayed, from the railway; and it was contended, that the damage had arisen in consequence of this omission to make good the fence when they discontinued working. There was contradictory evidence, as to whether the following ticket had been delivered at the time the horses were booked at *Liverpool*:—

" Ticket for horses and carriages,

" From *Liverpool* to *Birmingham*, 4½ o'clock train,

" *February*, 13th, 1838. *Palmer*.

" Nine horses to *Birmingham*, carriage to, 210*s.*, paid.

" *E. C.*"

" This ticket is issued, subject to the owners undertaking all risks of conveyance whatsoever, as the company will not be responsible for any injury or damage (however caused) occurring to horses or carriages travelling on the Grand Junction Line."

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The plaintiff, in an early part of his case, tendered evidence to shew that the fence which separated the field, from which the horse strayed, was not properly kept up. This evidence was objected to, on the ground of the form of the declaration; but the point was reserved, as contended by the defendant. It did not appear, from the report of the learned judge, that any formal objection was taken at the close of the plaintiff's case, on the ground that the evidence did not support the declaration as framed. It was contended, by the defendants, that they were entitled to notice of action, under the 214th section (a) of the 3 & 4 W. 4, c. 34. The learned judge reserved leave to move to enter a nonsuit on this point, and left two questions for the jury; first, whether the accident was occasioned by gross negligence of the defendants; and secondly, whether the above ticket ever came into the possession of the plaintiff's son, or any other person acting for the plaintiff. The jury found gross negligence in the defendants, and that no ticket had been given, and a verdict was returned for the plaintiff, with 150*l.* damages.

M. D. Hill, in *Michaelmas Term*, 1838, had obtained a rule to enter a nonsuit; first, on the ground that the declaration was not supported by the evidence; and secondly, that notice of action should have been given. He also moved for a new trial, on the ground of misdirection by the learned judge, in leaving it to the jury to consider whether the ticket ever came into the possession of the plaintiff's son, instead of leaving to them the question whether or not it was read over to him, or its contents communicated to him.

Humfrey and *Waddington* shewed cause.—First, there was conflicting evidence, as to whether the ticket was delivered to the plaintiff's son. The question was one for the determination of the jury, and was fully left to them, and they have found for the plaintiff. Then, it is said, that the evidence,

(a) Section 214, enacts, " That no action, suit, or information, nor any other proceeding, of what nature soever, shall be brought, commenced, or prosecuted against any person for any thing done or omitted to be done, in pursuance of this Act, or in the execution of the powers, or authorities, or any of the orders made, given, or directed in, by, or under this Act, unless fourteen days' previous notice, in writing, shall be given by the party, or parties, intending to commence, and prosecute such action, &c., to the intended defendant or defendants; nor unless such action, &c., shall be brought or commenced within three calendar months next after the fact committed, (or in case there shall be a continuation of damage, then within three calendar

months next after the doing or committing such damage shall have ceased), nor unless such action, &c., shall be laid and brought in the county or place where the matter in dispute, or cause of action, shall arise; and the defendant or defendants in such action, &c., may plead the general issue, and give this Act and the special matter in evidence, at any time to be had there upon, and that the acts were done, or omitted to be done, in pursuance of or by the authority of this Act; and if it shall so appear, or if it shall appear that such action, &c., hath been brought otherwise than as hereinbefore directed, then and in every such case the jury shall find for the defendant or defendants."

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which shewed negligence on the part of the company, as railway proprietors in not keeping up the fences, does not support the declaration, which charges them with negligence, as carriers. But the action is, in substance, for a breach of duty, as carriers; and the averment that the company were railway proprietors, is quite immaterial. The second plea, in effect, denies that the defendants entered into the contract as carriers, from which it is evident that they intended to set up a special contract, limiting their liability, and, therefore, the plaintiff gave evidence of gross negligence. There is nothing in the Act of Parliament to limit their responsibility as carriers. In the first place, it enables them to make a railroad; then it permits them to become carriers upon the railroad, if they shall think fit (b). Having made their election, the common law duties of carriers are cast upon them. If the negligence consists in not keeping up the fences, that is a duty imposed upon the company by common law.—[*Alderson, B.*—There can be no common law liability to keep up fences. With respect to persons whose land adjoins the railway, there may be an obligation to put such fences as will keep cattle from straying; but not as between the public and the company.]—The legislature having enabled the company to make a railroad, it is their duty to keep the road clear, *Parnaby v. The Lancaster Canal Company* (c). But no leave was reserved to enter a nonsuit on the ground of variance; and if the objection had been taken at the trial, an amendment would have been allowed.

Lastly, no notice of action was necessary. It cannot be said that the injury has arisen from an "act done," or "omitted to be done, in pursuance of the Statute." The "acts done" within the meaning of the 214th section, are acts which are necessary for the formation of the railroad; and the "acts omitted to be done," are acts imposed upon the company by the legislature; such as erecting bridges of a sufficient height over public highways, fencing off the railroad from the adjoining lands when the owner shall require them. The true definition is given by *Bayley, J.*, in *Smith v. Shaw* (d), who says, "According to the decisions upon similar words, a thing is understood to be done in pursuance of the Act, when the person who does it is acting honestly and *bonâ fide*, either under the powers which the Act gives, or in discharge of the duties which it imposes." They cited the following authorities: *Fletcher v. Greenwood* (e), *Wallace v. Smith* (f), *Sellick v. Smith* (g), *Umphelby v. M'Lean* (h), *The Wiltshire and Berkshire Canal Company* (i), *Cook v. Leonard* (j), *Edge v. Parker* (k), *Carruthers v.*

(b) Section 156 enacts, "That it shall be lawful for the said company, and they are hereby authorized (if they shall think proper, to use, and employ locomotive and other engines, or other moving power, and in carriages and waggons drawn or propelled thereby), to carry or convey upon the said railway, all such passengers, cattle, goods, wares, and merchandize, articles, matters, and things, as shall be offered to them for that purpose, and to make such reasonable charges for such carriage and conveyance, as they may from time to time determine upon, in addition to the several tonnages and tolls hereinbefore authorized to be charged and

received; provided that neither the said company, nor any other person or persons, using the said railway as carriers, shall ask, demand, or be entitled to take (both for toll and carriage), any greater sums than the following; (that is to say) &c."

(c) 1 Wil. Woll. & Hodges, 22.

(d) 10 B. & C. 284.

(e) 1 Gale, 34.

(f) 5 East, 115.

(g) 11 Moore, 459.

(h) 1 B. & Ald. 42.

(i) 3 M. & Sel. 580.

(j) 6 B. & C. 351.

(k) 8 B. & C. 697.

Payne (l), Waterhouse v. Keen (m), Cook v. Clark (n), Butler v. Ford (o), Cane v. Chapman (p), Wedge v. Berkeley (q).

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M. D. Hill and *Daniel*, in support of the rule.—First, the learned judge misdirected the jury respecting the ticket. The son of the plaintiff denied ever having received the ticket; but he was contradicted by the servants of the company; one of whom distinctly swore that he received the ticket produced from the plaintiff's son. It was not enough to ask the jury whether the ticket had been received or not; but the question should have been, whether it was read over and explained. But secondly, notice of action should have been given, in order that the company might have had an opportunity of tendering amends. The accident arose from the non-repair of the fences, which was not the neglect of a common law duty, but an "act omitted to be done" within the terms of the Statute. By section 180 (r), the company, at their own expence, are forthwith to make and erect convenient gates and fences. And by section 182 (s), they are required, after any land shall have been taken for the use of the railway, to separate the same from the adjoining lands.—[*Alderson*, B.—Those clauses are only compulsory, as between them and the landlords.]—The fences being found there, it will be presumed, that they were made at the request of the owner of the adjoining lands; and having once been erected, the company are bound to keep them up. This, then, is no common law duty, but arises from a statutory provision. In considering this question, it is necessary to see for what purpose the company is formed, and what are its powers under the Act. The

(l) 5 Bing. 270.

(m) 4 B. & C. 200.

(n) 10 Bing. 19.

(o) 1 C. & M. 662.

(p) 5 Adol. & E. 647.

(q) 6 Adol. & E. 663; 1 Will. Woll. & D. 271.

(r) Section 180 enacts, "That the said company shall, at their own expence, so soon as the said railway shall have been laid out and formed, *forthwith make and erect*, and from time to time maintain, such and so many convenient gates in, upon, or adjoining the said railway, and such and so many bridges, arches, hollows, culverts, fences, ditches, drains, and passages, over, under, or by the side of, or leading to, or from, the said railway, of such dimensions, and in such manner, as two or more justices of the peace for the said counties of *Lancashire, Chester, Stafford, or Warwick*, within their respective jurisdictions, shall, upon the application of the owner, lessee, or tenant of any lands, mines, or minerals, judge necessary and appoint, (in case there shall be any dispute about the same,) *for the use of the owners and occupiers of the respective lands, mines, and minerals, through or over which such railway shall be made, and for the commodious use and occupation of their lands, &c., on either side*

of the said railway, or for protecting the said lands, &c., from trespass, or the cattle, or other property of the owners, or occupiers thereof, from straying or escaping thereout, by reason of such railway, or any matter, or thing, to be done in pursuance of this Act; and all such gates, &c., shall from time to time, and at all times thereafter, be maintained in sufficient repair and condition by the said company, &c."

(s) Section 182 enacts, "That the said company shall, and they are hereby required, at their own expence, after any land shall have been taken for the use of the said railway and other works, to separate the same, and to keep the same constantly separated from the lands adjoining to such railway and other works, with good and sufficient pools, rails, hedges, ditches, mounds, or other fences, in case the owners of such lands adjoining to such railway and other works, or any of them respectively, shall at any time desire the same to be so fenced off, or in case the said company shall think proper, so to fence off the same (instead of erecting gates across the same,) and shall make, and maintain, all necessary gates and stiles in all such fences, to be made as aforesaid."

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Act enables them to construct and maintain a railway; and if there were no clause enabling them to carry, it would be illegal for them to do so. The clauses enabling them to make the railway, and those allowing them the option of becoming carriers, are quite distinct. There is one set of tolls payable to them, as proprietors of the railway, and a distinct rate in respect of their claim as carriers (*t*). They can only carry by virtue of the Statute; and, consequently, a notice of action is necessary. In *Blakemore v. The Glamorganshire Canal Navigation* (*u*), Lord Eldon says, "That he looks upon all these Acts of Parliament as contracts, which have become extremely numerous, and from their number and operation, much affect individuals; and that they who come for them to Parliament, do, in effect, undertake that they shall do and submit to whatever the legislature empowers and compels them to do, and that they shall do nothing else." *Lee v. Milner* (*v*), is also an authority that these Acts must be construed strictly. The cases cited on the other side, do not controvert the doctrine contended for. In most of them, the words, "omitted to be done," are not to be found.

Lastly, the evidence did not support the declaration. This is not the common form of declaring against carriers; it is an action on the case against the company as railway proprietors; but the negligence is confined to the conduct of the carriages. If any other kind of negligence is proved, the plaintiff cannot recover, *Mayor v. Humphries* (*w*).—[*Parks, B.*—If the objection had been taken at the close of the plaintiff's case, the declaration would have been amended. The only objection made was to the reception of evidence, not to the form of the declaration.]—It is difficult to say that any amendment would have made this declaration good, as it does not charge the defendants as common carriers; and it is material to consider whether all the common law liabilities of carriers would attach to this new and extensive mode of conveyance. With respect to the liability of carriers, a distinction has been taken between passengers and goods; and the reason is said to be, that passengers are contractors themselves. But the more probable reason is, that passengers are able to get into danger themselves. A child is not able to contract for itself, yet the carriers' responsibility does not extend to children. If the true reason be, that a passenger may get into danger, the exception would extend to animals also.—[*Parks, B.*—Would a carrier be liable for an accident to a horse tied to the tail of a waggon?—Not if he took ordinary care, and the horse, from being a kicker, or from intractability of its temper, met with an accident. It would be like sending goods badly packed in a bale. The party would be the cause of his own injury. In *Christie v. Griggs* (*x*), the distinction between goods and passengers is recognised;

(*t*) Section 154 enacts, "That it shall be lawful for the company to demand, receive and recover to and for the use and benefit of the said company, for the tonnage of all articles, matters, and things, which shall be carried or conveyed upon or along the said railway, or any part thereof, any rates or tolls not exceeding the following, (that is to say), &c."

Section 155 enacts, "That it shall be lawful for the said company to de-

mand, receive and recover, to and for the use and benefit of the said company, for and in respect of passengers, beasts, cattle and animals, conveyed in carriages upon the said railway, any tolls not exceeding the following, (that is to say), &c."

(*u*) 1 Mylne & K. 154.

(*v*) 1 Mur. & Hurl. 275; 2 M. & W. 824.

(*w*) 1 C. & P. 251.

(*x*) 2 Camb. 81

and it is said, that the extended liability for goods, is in order to prevent collusion with thieves.

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PARKE, B.—The Court are of opinion that the rule ought to be discharged. Upon the first point, we think the first question was substantially left to the jury. The second objection is, that the learned judge was wrong in ruling that no notice of action was requisite in this case. Now, that question turns mainly upon the 214th section of this Act; and also opens the other question, namely, in what character this action is brought against the defendants? If the gravamen of the charge against them was negligence in not duly fencing off the railway, then I think a notice of action would be requisite, inasmuch as the action would have been brought for a thing which they ought to have done and which they omitted to do in pursuance of the Act. But when the matter is fully examined, it appears that the action is not brought for that, but against the defendants, as common carriers, who have received nine horses, upon an undertaking to deliver them safely at the journey's end, but have failed so to do. They were not acting in pursuance of the powers given them by the Act of Parliament; the Act does not direct them to be common carriers, but only enables them to carry goods upon the railway, if they shall think fit. When they have elected to become carriers, then, whatever they do, in the course of that trade, is done in pursuance of the duties cast upon them as common carriers, and not by virtue of the Act of Parliament. I, therefore, think, that upon the proper construction of the 214th section, no notice of action was required in this case. Another objection was, that the real ground of complaint against the company was substantially for negligence, in not properly keeping and protecting the railroad, and that the charge is not correctly described in the declaration. I have some doubt whether the breach is such as to let in proof of non-delivery; but it is a sound rule of law to lay down, that whatever objection there is to the declaration, should be pointedly or formally taken at the close of the plaintiff's case; and then, if amendable, as the present objection certainly was, the necessary alteration would be made. It is clear, from the notes of the learned judge, that no objection was made to the declaration; and if that had been done, we must assume that the plaintiff would have amended. I agree, as it has been ably argued by Mr. *Daniel*, that if the defendants are not liable as common carriers, that no amendment would have made the declaration good, and the plaintiff must have been nonsuited, unless he could have shown that a duty to keep up and repair the fences generally, was cast upon the company by the Act, and that there had been negligence on their part in that respect; in which case, notice of action would have been necessary. That brings us to the consideration of what was the situation of the defendants as common carriers. And with respect to that, we must see what is the proper construction of the 156th section; for the company have no power to become so, unless they are enabled by the legislature. By that section, they may, if they shall think proper, use locomotive engines, and carry such passengers, goods, and merchandize as shall be offered to them for that purpose, making certain reasonable charges for the same. If then, they avail themselves of this permission, and become carriers and accept goods for that purpose, without in any way limiting their responsibility, which they have not done in this case, the question is, whether the common

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law duty is not cast upon them as carriers. I am of opinion that it is ; and that having received these horses to carry from *Liverpool to Birmingham*, and safely deliver them, which they have not done, that they are liable, as the accident which prevented it did not arise from the act of God, or the king's enemies, which are the exceptions in favour of carriers. On these grounds, I am of opinion that the rule must be discharged.

ALDERSON and GURNEY, Barons, concurred.

Rule discharged.

END OF HILARY TERM.

A
D I G E S T
 OF THE
CASES REPORTED IN THIS VOLUME,
 CONTAINING
THE DECISIONS OF THE COURT OF EXCHEQUER,
 FROM
HILARY TERM, 1838, TO HILARY TERM, 1839, INCLUSIVE.

AGREEMENT.

See **STAMP.**

1. By memorandum of agreement, certain marsh lands were demised by the plaintiff to the defendants, subject to a condition that the defendants should pay all out-goings whatsoever, rates, taxes, scots, whether parochial or parliamentary, that then were or should thereafter be charged or chargeable upon or on account of the said marsh lands (the then present land-tax only excepted):—*Held*, that an extraordinary assessment made by the commissioners of sewers, was a "parliamentary scot," within the meaning of the agreement. *Waller v. Andrews*, 87.

2. Four-fifths of the rate were assessed upon the owners, and one-fifth upon the occupiers. For four years the defendants, on payment of their rent, were allowed by the plaintiff's agents (who were ignorant of the agreement) to deduct from the amount of rent the four-fifths of the rate, and a receipt was given for the balance:—*Held*, in an action to recover the sums so allowed, as arrears of rent, that the facts supported a plea of payment. *Id.*

3. The time of credit given upon a mercantile contract must be reckoned exclusively of the day on which the contract was entered into. *Webb v. Fairmaner*, 108.

AFFIDAVIT.

1. Affidavits may be used by both parties, as soon as they are filed. *Price v. Hamer*, 191.

2. The Court will not, on a motion for a new trial, receive the affidavit of a party, stating that he was informed by one of the jury that the verdict was decided by the drawing of lots. *Straker v. Graham*, 449.

3. Nor is the affidavit of a juryman himself admissible for this purpose. *Id.*

4. The Court will receive the affidavit of a party who actually saw the jury draw lots, or take the necessary steps for that purpose. *Id.*

AMENDMENT OF RECORD.

The declaration stated that the defendant agreed to sell to the plaintiff, a certain quantity of potatoes, to be delivered by the defendant to the plaintiff, within a reasonable time; it then alleged, that although a reasonable time had elapsed, the defendant had not delivered the same. It appeared from the evidence that the potatoes were to be dug by the plaintiff, at the usual time for digging the same, and that the defendant refused to permit the plaintiff to dig and take them. The judge having amended the record accordingly, the Court refused a new trial, as it did not appear by affidavit that the defendant was prejudiced by the amendment. *Stanbury v. Matthews*, 459.

APPRENTICE.

Justices at Quarter Sessions, on discharging an apprentice from his indentures, are not empowered by the Stat. 5 Eliz. c. 4, s. 35, to

award restitution of any part of the premium. *East v. Pell*, 421.

ARBITRATION.

1. Debt for money paid, money lent, and on an account stated. *Pleas, nunquam indebitatus*, and set-off. Before trial, the parties agreed "to leave the action to the award of A., B. and C., and that the costs of the reference and award should abide the event of the said award." The arbitrator, who was not requested to award on each issue, awarded that the "plaintiff in the action below was not entitled to recover in that action, and that he had not, at the time of commencing the action, or at any time afterwards, any cause of action against the defendant." An action having been brought to recover the costs of the reference and award:—*Held, first*, that if it was intended that the arbitrator should award on each issue, he should have been requested so to do; *secondly*, that the arbitrator had determined the action. *Duckworth v. Harrison*, 349.

2. The cause, and all matters in difference, having been submitted to an arbitrator, with power to raise points of law, he found a verdict for the plaintiff, directing the damages to be reduced, if, upon certain facts stated by him, the Court should not consider the defendant liable to particular demands:—*Held*, that a motion to reduce the damages must be made within the time limited for setting aside the award. *Anderson v. Fuller*, 352.

3. Where, in an order of reference, a judge ordered that the parties to the writ (if the arbitrator should think fit), and their witnesses, should be examined upon oath, to be sworn before him or some other judge of the *Exchequer*, or commissioner duly authorized:—*Held*, that the arbitrator had the power of administering an oath to the witnesses. *Hodson v. Wise*, 360.

4. By an order of reference, a cause was referred to an arbitrator, who was to settle all matters in difference between the parties at law and in equity, &c., so that he should publish his award by a certain day, (with power to enlarge the time), ready to be delivered to the parties, or if either of them should be dead, to their personal representatives, and the arbitrator was to be at liberty to make one or more awards at his discretion. At the time of the submission, two suits in equity were pending, in which the parties to the action were interested, and in which certain infants were also concerned. Before an award was made, L., one of the parties to the equity suits, died. The arbitrator made his award, whereby he ordered that a verdict should be entered for the

plaintiff, damages 500*l.*, and that the defendant should pay the further sum of 350*l.* for grievances not included in the declaration:—*Held, first*, that the award was sufficiently final, although it did not dispose of the equity suits. *Secondly*, that it was not bad by reason of infants being parties to the suits. *Thirdly*, that the arbitrator's authority was not revoked by the death of L.; and *lastly*, that the award of 350*l.* for other grievances was sufficiently certain. *Wrightson v. Bywater*, 50.

5. In an action by the assignees of a bankrupt, the first four counts were for money paid, &c., laying the promises to the bankrupt. There were similar counts, laying the promises to the assignees. The defendant pleaded, as to the first four counts, except as to 239*l.* 13*s.* 4*d.*, *non assumpsit*; *secondly*, to the whole declaration, denial of the bankruptcy; *thirdly*, to the first four counts, a set-off; *fourthly*, to the same counts, payment; *fifthly*, to the same counts, release; *sixthly*, as to 80*l.* 12*s.*, parcel of the first four counts, payment by two promissory notes; *lastly*, to the last set of counts, a similar plea of payment. The cause was referred to an arbitrator, who was to be at liberty to vacate the verdict, and enter a verdict for the defendant; the costs of the award and reference to abide the event. The arbitrator ordered, that the verdict entered for the plaintiff be vacated; and that a verdict be entered for the plaintiff on the first, second, fourth, fifth and sixth issues; and for the defendant on the third and last:—*Held*, that the award was bad, inasmuch as the arbitrator had not found for the defendant on any plea which covered the whole cause of action; and that although he had found for the plaintiff, he had awarded no damages. *Wood v. Duncan*, 338.

ARREST.—See BARRISTER.

ATTACHMENT

1. A writ of *venditioni exponas* forms part of a writ of *fi. fa.*, and if not returned in obedience to a judge's order, subjects the sheriff to an attachment under Rule 13 *Mick. Term*, 3 Will. 4. *Hughes v. Rees*, 347.

2. In an application by the sheriff or bail to stay proceedings, the affidavit must state that it is made "for his or their indemnity only;" the words "for his only indemnity," are insufficient. *Regina v. Sheriff of Cheshire*, 202.

3. An attachment for non-payment of costs cannot be supported upon the demand of a third person, to whom the attorney has given an authority to receive them. *Clark v. Digman*, 86.

4. The defendant was described in the consent-rule as *John Barnes*, and in the affidavit of service and of the execution of the power of attorney, as *John Barns*. The Court granted an attachment against him for non-payment of costs, on the ground that the name was *idem sonant*. *Doe*, dem. *Stowell v. Barnes*, 432.

5. Where an order of reference and enlargement of time have been made a rule of Court, it cannot be shewn as cause against an attachment for non-performance of the award, that there was no affidavit that the time was duly enlarged; but, if in fact there is no such affidavit, the proper course is to move to set aside the rule of Court. *Barton v. Ranson*, 11.

ATTORNEY.

1. An attorney is not bound to pay the costs of taxation, where more than one-sixth has been taken off his bill, unless the order contains the undertaking required by the 2 Geo. 2, c. 23, s. 23, or money has been paid into Court for that purpose. *Rogers v. Petersen*, 467.

2. *A.*, an attorney, had done business for the plaintiff, which did not contain any taxable item. He had also paid 15*l.* 15*s.* as the costs of discontinuing an action, but he swore that he had never made, nor intended to make any charge in respect of that suit; the Court refused to compel him to deliver a signed bill in pursuance of the 3 Jac. 1, c. 7, and 2 Geo. 2, c. 23. *Sparrow v. Johns*, 116.

3. *Quare*, if such a payment be a taxable item. *Id.*

4. The Court will compel a bankrupt's attorney, who has admitted the receipt of money on account of the bankrupt, to deliver his bill to the assignees. *Clarkson v. Parker*, 343.

5. An attorney, who has received a declaration for a defendant, for whom an appearance has been entered, cannot be changed without a rule of Court. *May v. Pyke*, 196.

6. Where, on reference of an attorney's bill to taxation, the parties agree to waive the delivery of a signed bill *primâ facie*, they waive the operation of the 2 Geo. 2, c. 23. *Gerrard v. Arnold*, 18.

BAIL.

1. Where a married woman has been arrested, and has put in special bail, the Court will order the bail-bond to be delivered up to be cancelled, unless at the time of incurring the debt she represented herself as a *feme sole*. *Hollingdale v. Lloyd*, 119.

2. Where the defendant was out on bail before the 1 & 2 Vict. c. 110, came into operation, and it appeared that he was residing abroad, the Court refused to relieve the bail. *Lewis v. Ford*, 331.

3. The 1 & 2 Vict. c. 110, s. 3 (enabling a judge to make an order for arresting the defendant), applies to all cases in which the defendant is about to leave *England* for such a period that the plaintiff would be deprived of his execution in the ordinary course. *Larchin v. Willan*, 332.

4. On the 6th *July*, the defendant was arrested, and on the 14th, a summons was taken out to stay proceedings, upon payment of debt and costs. An order was accordingly made, which provided that, "in default of payment, the plaintiff should be at liberty to sign final judgment." The costs were taxed, but nothing further was done under the order. On the 14th *August* the plaintiff took an assignment of the bail-bond, and on the 9th *September* the defendant died:—*Held*, that the bail were entitled to relief, upon payment of the costs of the bail-bond. *Isaacs v. Richards*, 333.

5. Where proceedings have been taken against the bail, affidavits in support of an application to set aside the *ca. sa.* are properly entitled, both in the original action, and in that against the bail. *Pocock v. Capperton*, *Pocock v. Percy*, 334.

6. A writ of *ca. sa.* was lodged at the sheriff's office on the 24th *October*, and on the 3d *November* proceedings were commenced against the bail:—*Held*, too late to apply on the 13th *November* to set aside the *ca. sa.* *Id.*

7. The 1, 2, 3 & 4 rules of *T. T.*, 1 Will. 4, apply only to cases of bail put in in the ordinary course; therefore, where the sheriff puts in bail under a body rule, he must justify without notice of exception. *The Queen v. The Sheriff of Middlesex*, 335.

8. Bail must swear that they are worth the necessary amount "*over and above what will pay all their just debts.*" *Edmunds v. Keats*, 19.

9. The defendant was held to bail in an action on the case in the nature of waste, upon an affidavit of the plaintiff's attorney, "that defendant had on a certain day commenced pulling down, taking down, and destroying, and from thence hath proceeded in pulling down, and taking down, and destroying, the front and back parts of the roof and tiling, &c., and hath committed great waste and destruction to those premises, already amounting, as this deponent has been informed, and believes to be, 63*l.* 11*s.* :—*Held*, sufficient. *Hodgson v. Dowell*, 29.

BANKRUPT.

1. The tenant of leasehold premises, assigned them by way of mortgage, and afterwards became bankrupt. The lease contained a covenant to yield up all fixtures to the messuage belonging or to belong:—*Held*, that the fixtures did not pass to the assignees as goods and chattels, in the possession, order, and disposition of the bankrupt; and that the mortgagee might maintain an action in case as reversioner, against the assignees for removing them. *Hitchman v. Walton*, 374.

2. *A.*, for the accommodation of *B.*, indorsed a bill of exchange drawn by *B.* upon and accepted by *C.*; before the bill became due *B.* became bankrupt, and *C.* having made default, *A.* paid the bill, and sued *B.* for money paid:—*Held*, that *A.* was in the situation of a surety to *B.*, and that the certificate was a bar to the action. *Heigh v. Jackson*, 167.

3. In assumpsit by the assignees of a bankrupt, for not accepting certain shares in the *Great Western Railway*, which the bankrupt contracted before the bankruptcy to sell the defendant, and to convey to him on or before a certain day, which was after the bankruptcy; the declaration averred, that the plaintiffs were proprietors of the shares, and that they tendered certificates of them to the defendant. The defendant pleaded that *J.* did not commit an act of bankruptcy; that the act of bankruptcy upon which he was declared a bankrupt was concerted between *J.* and one of the plaintiffs; that the plaintiffs were not proprietors of the said shares; and that they did not tender the certificates to the defendant. *Hare v. Waring*, 90.

4. The act of bankruptcy was, that *J.* had given directions to his son to deny him to any one who might call, but it did not appear that any person actually called, or that *J.* secreted himself:—*Semble*, that this was not an act of bankruptcy. *Id.*

5. *Semble*, that this was not a case within the 92d sec. of the 6 G. 4, c. 16, by which the depositions are made conclusive evidence of the matters contained in them, inasmuch as the bankrupt could not have fulfilled his contract on the day specified; but that even if it were within that section, evidence might be given to shew that the bankruptcy was concerted. *Id.*

6. In order to prove their proprietorship of the shares, the plaintiffs produced the transfer-book of the Company, in which they were entered as transferees:—*Held*, that there was not sufficient evidence of their title. *Id.*

7. The certificates tendered by the plaintiffs did not contain the names of the plaintiffs as original proprietors, nor had they any indorsement of transfer to them:—*Held*, that such

certificates did not shew a title in the plaintiffs to convey the shares. *Id.*

8. A written acknowledgment by a bankrupt, tending to charge him, and bearing date before his bankruptcy, is, as against his assignees, *prima facie* evidence of its having been made on the day on which it bears date. *Sinclair v. Baggaly*, 194.

9. On a question of fraudulent preference, the declarations of the bankrupt, although made before the payment in question, or the act of bankruptcy, are admissible in evidence, as proving his intention in making that payment. *Thomas v. Connell*, 189.

10. *Semble*, they ought not to be admitted, until some foundation has been laid for their reception, by the proof either of the insolvency or the payment. *Id.*

BARRISTER, PRIVILEGE OF

A practising barrister was arrested on *mesne* process, on returning from Court to his chambers, there being at the time three writs of *ca. sa.* against him at the sheriff's office. He thereupon applied to a judge for his discharge, on the ground of his having been arrested while privileged, but made no application to be discharged in respect of the writs of *ca. sa.* The judge having ordered him to be discharged, the sheriff detained him in custody on the writs of *ca. sa.*:—*Held*, that the sheriff was justified in so doing. *Watson v. Carroll*, 427.

BILL OF EXCHANGE.

1. The defendant accepted a bill of exchange, payable generally. After the acceptance, the drawer, without his knowledge, made it payable at a certain banker's:—*Held*, that the acceptor, in an action against him by the indorsee, who did not state the bill to be payable at any particular place, might prove these facts under the plea of *non accepit*. *Calvert v. Baker*, 404.

2. In answer to an application made to the defendant for payment of the bill, his attorney stated in a letter that the defendant had never made the bill payable at the banker's in question, nor at any other place in town, but had refused to pay it, except at his own house. That the bill must have been altered as to the acceptance, and that the defendant would take such steps as the law would authorize on the subject. That he had been prepared for payment, and that the party might have his money by calling at the defendant's house:—*Held*, that this was not evidence under the account

stated of any liability on the part of the defendant to pay the bill. *Id.*

3. Where to an action on a bill of exchange, the defendant pleaded that he was only liable as surety, and that time had been given to the principal:—*Held*, that he was not entitled to inspect the deed in the plaintiff's possession, although it was suggested that time had been thereby given to the principal, the defendant being no party to the deed. *Smith v. Winter*, 45.

4. Where a party drew a bill dated "*London*," (without any other address,) a notice of dishonour sent by the post, directed to the drawer "*London*," was held sufficient to go to the jury that he had had due notice of dishonour, although the acceptor also resided in *London*, and his address appeared on the bill. *Clarke v. Sharpe*, 35.

5. In proceedings against the sheriff, arising out of an action by indorsee against acceptor of a bill of exchange, where there is also an action against the drawer, the sheriff will be entitled to a stay of proceedings upon payment of the debt and costs in the action against the acceptor only. *Ball v. Blackwood*, 112.

BI L OF LADING.

1. *T.*, a corn-factor, was in the habit of sending oats by a canal from *Longford* to *Dublin*, to the care of his agents at the latter place, to be forwarded by them to *Liverpool* or *London*. On the 2d *February*, he sent to the plaintiffs, his factors, two receipts signed by the masters of two canal boats, Nos. 604, and 54, dated 31st *January*, resembling bills of lading in their language, and expressing that two cargoes of oats had been shipped at *Longford* for the plaintiffs. At the date of these receipts, boat No. 604 was completely loaded, and boat 54 partially so. *T.* at the same time informed the plaintiffs that he had valued against them on account of these cargoes. On the 7th *February*, the plaintiffs returned for answer, that they had accepted the bills. These bills were afterwards paid by them. The defendant, who was the creditor of *T.* sent an agent to *Longford*, for the purpose of obtaining from *T.* some oats, that had not arrived according to agreement. On the 6th *February*, *T.*, being pressed by the defendant's agent, agreed to transfer to him the cargoes of the two boats; and on the 9th *February*, sent from *Longford* to the defendant's agent, who was then at *Dublin*, a boat receipt similar in form to those of the plaintiffs, entitling the defendant to the cargo of the boats Nos. 604 and 54. The agent received these receipts on the 9th *February*, and on the arrival shortly after of the boats Nos. 604 and 54, took possession of their cargoes, which were afterwards sold by the de-

fendant:—*Held*, first, that the plaintiffs had a complete title to the cargo of boat No. 604, at least on the 7th *February*, the day of their accepting the bills. Secondly, that as on the 31st of *January* there were no oats on board the boat No. 54, no specific chattels were held for the plaintiffs. That no appropriation took place until the 9th *February*, when the master signed the boat receipts for the oats then on board boat 54, and thereby made himself the defendant's agent for the purpose of holding these oats. That the plaintiffs were therefore entitled to the cargo of boat 604, and the defendant to that of boat 54. *Bryan v. Nix*, 480.

2. *Quare*, whether receipts for goods given by the master of a canal boat, and in form resembling bills of lading, possess all the properties of those instruments. *Id.*

BRIBERY.

An agreement to withdraw, in consideration of money, an election petition, presented against the return of a member of the House of Commons on the ground of bribery, is illegal. And such an agreement is admissible in evidence to prove the illegality of the transaction without being stamped. *Coppock v. Bower*, 340.

COGNOVIT.

1. An infant cannot execute a cognovit. *Oliver v. Woodruffe*, 474.

2. To constitute an express naming of an attorney within the 1 & 2 Vict. c. 110, s. 9, it is not necessary that the attorney should be in the first instance named by the defendant; it is sufficient if he afterwards adopts him. *Id.*

3. Nor need the attestation state that the attorney was named by the defendant; it is sufficient if he declare himself attorney for defendant, and state that he subscribes as such. *Id.*

4. It is no objection that the cognovit was not read over to defendant, if its nature and effect be explained to him. *Id.*

CONTRACT.

1. Upon a treaty for the purchase of a mare, the defendant wrote to the plaintiff, "I will take the mare at twenty guineas, of course warranted." And he again wrote, "my son will be at the *World's End* on *Monday*, when he will take the mare and pay you; if you want to go elsewhere, send any body with a receipt, and the money shall be paid; only say in the receipt, *sound, and quiet in harness*."

The plaintiff, in answer, wrote, "she is warranted sound, and quiet in *double harness*; I never put her in single harness, as I never wanted it." The mare was sent to the *World's End*, but the plaintiff's servant not finding the defendant's son, left the mare in the care of the landlord. Afterwards, the defendant's son came, and took the mare home, where she was kept a few days, and then returned as unsound:—*Held, first*, that there was no evidence of a complete contract in writing; *secondly*, that there was no acceptance upon the terms of the limited warranty, as the defendant was not bound by the act of his son, in bringing the mare home, under the circumstances. *Jordan v. Norton*, 234.

2. The plaintiff sent a mare to the defendant, a farmer, to be covered by a stallion belonging to him; the contract was performed on a *Sunday*. The defendant afterwards claimed to detain the mare until he was paid a sum of money, which consisted of the fee due on that occasion, and also of other monies due to the defendant on their general account:—*Held, first*, that the defendant was entitled to a lien for the costs of covering the mare. *Secondly*, that this was not a contract within the 29 Car. 2, c. 7, s. 1, it not being made in the exercise of the defendant's ordinary calling; and that even if it were, the contract having been executed, the lien would attach. *Thirdly*, that the claim by the defendant to retain the mare in respect of two sums, for one of which the lien could not be supported, was not a waiver of his lien as to the other, nor did it dispense with the necessity of a tender of that sum. *Scarfe v. Morgan*, 292.

3. The time of credit given upon a mercantile contract must be reckoned exclusively of the day on which the contract was entered into. *Webb v. Fairman*, 108.

4. A railway Act declared that "all shares in the undertaking, should, to all intents and purposes, be deemed personal property, and be transmissible as such, and should not be deemed to be of the nature of real property":—*Held*, that such shares might be sold by verbal contract. *Bradley v. Holdsworth*, 156.

5. *Semble*, that this would be so, though the Act contained no such clause. *Id.*

6. The defendant wrote to the plaintiff as follows: "Send me your patent hopper and apparatus to fit up my brewing copper with your smoke-consuming furnace." The patent furnace was accordingly sent and erected, but was found to be useless in a brewery:—*Held*, that the contract was satisfied by erecting the furnace; and that there was no implied warranty that it should be suitable for a brewery. *Chanter v. Hopkins*, 377.

7. Where a written contract for the sale of goods is silent as to the time of their delivery, parol evidence is admissible, to shew facts from

which the reasonableness of the time of delivery may be inferred, as such evidence does not vary the contract. *Ellis v. Thompson*, 131.

CORPORATION.

1. The declaration stated, that the half of certain land, over which a corporation had a right of common, was vested in the corporation by Act of Parliament. That by a rule, order, and ordinance of the corporation, the land was ordered to be leased, and part of the rents to be divided annually, on the 2d November, among certain senior burgesses. That an annual sum was accordingly paid to the plaintiff as such burgess, previously to the passing of 5 & 6 Will. 4, c. 76; but that since that time the defendants had refused to pay that sum to the plaintiff. *Plea*: that before the commencement of the suit, to wit, on November 2d, 1836, the defendants necessarily, and as they were legally required and bound to do, paid all the rents by them received from the said lands, together with and among other rents and sums of money, amounting to 2,000*l.*, in satisfaction of debts then due and payable to divers persons from the defendants in their corporate capacity, out of the property of the borough, and amounting to 2,000*l.*, and by law then payable in priority and preference to the payment of the twelve senior burgesses of the yearly sums mentioned to have been due to them on the 2d November:—*Held, first*, that the rule and ordinance of the corporation was a bye-law, on which an action could be maintained. *Hopkins v. The Mayor of Swansea*, 432.

2. *Secondly*, that the plea was bad, as it did not state that the debts were contracted before the passing of the 5 & 6 Will. 4, c. 76, so as to entitle the defendants, under the 92d section, to pay the creditors of the borough, to the prejudice of the plaintiff's claim. *Id.*

3. *Thirdly*, that as the corporation could not, under the 5 & 6 Will. 4, c. 76, pay their creditors *voluntarily*, to the prejudice of the plaintiff's rights, that the plea ought to have stated, either that they were *compelled* by their creditors to pay their debts, or that the sums paid to creditors were a specific charge upon the land, from which the annual payments to the burgesses issued. *Id.*

4. *Semble*, that the plea ought to have stated that there was no surplus annual income remaining, after payment of the interest due to creditors, the salaries of municipal officers, and other lawful expences. *Id.*

COSTS.

1. The rule of this Court, which requires the delivery of a bill of costs, previously to taxa-

tion, does not apply to cases in which the defendant has not appeared. *Burch v. Poynter*, 1.

2. In an action on an attorney's bill, with a plea of set-off, the cause being partly heard, it was referred to the Master, who was to enter into the whole account. The Master found a balance due to the plaintiff of 2*l*. 12*s*. :—*Held*, that this was a sum "recovered" within the directions to taxing officers, and that the plaintiff was not entitled to costs upon the higher scale without a certificate. *Parker v. Serle*, 21.

3. If in a short cause an attorney willfully make a charge, however small, to which he is not entitled, the Court will not allow him the costs of taxation, though less than one-sixth be taken off. *Holderness v. Burkwith*, 21.

4. To trespass for breaking and entering plaintiff's stable, and taking a horse, defendant pleaded not guilty, that the stable was not the plaintiff's, and leave and licence. A verdict having been found for the plaintiff with one farthing damages, the judge certified under the 43 Eliz. c. 6. :—*Held*, that the plaintiff was entitled to full costs, notwithstanding the judge's certificate. *Purnell v. Young*, 22.

5. Trespass for breaking and entering the plaintiff's dwelling-house and distraining his goods. *Plea*:—as to the breaking and entering, leave and licence; as to the residue, not guilty. Verdict for the plaintiff, damages 6*d*. :—*Held*, that the judge might certify under the 43 Eliz. c. 6. *Mills v. Stevens*, 106.

6. Trespass for breaking and entering the plaintiff's dwelling-house and stable and assaulting the plaintiff. *Pleas*: First, not guilty. Secondly, that the dwelling-house was not the plaintiff's. Verdict for the plaintiff, damages one farthing :—*Held*, that the plaintiff was entitled to full costs. *Pugh v. Roberts*, 112.

7. A tenant, whose goods had been distrained, brought an action of trespass, the expense of which was paid by his landlord, who was the party really interested in the event of the action. Judgment, as in case of a nonsuit, having passed against the tenant, who was in indigent circumstances; the Court discharged a rule, calling upon the landlord to pay costs. *Hayward v. Grove*, 192.

8. It is unnecessary, under the twelfth rule of *Trinity Term*, 1 W. 4, to give a twenty-four hours' notice of taxing costs. *Edmonds v. Cates*, 190.

9. Where some issues have been found for the plaintiff, and others for the defendant, the latter is entitled to the costs of those only of his witnesses whose evidence has been confined to the issues that have been found for him. *Crowther v. Etwell*, 187.

10. Trespass for assault, battery, and false imprisonment. *Plea*, not guilty. The plain-

tiff obtained a verdict, with one farthing damages, and the judge refused to certify, either under the 43 Eliz. c. 6, or 22 & 23 Car. 2, c. 9 :—*Held*, that the plaintiff was entitled to full costs. *Gould v. Drake*, 155.

11. Under the 9 Geo. 4, c. 22, s. 60, the Speaker of the House of Commons has power to ascertain and certify the amount of costs, in cases in which the petitioner has failed to appear on the day appointed for taking the petition into consideration. *In re Scott v. Silver*, 276.

12. *Semble*, that the legislature intended to give no remedy for these costs by action, as it had done under the 53 Geo. 3, c. 71, but that the remedy on the recognizance was still to continue. *Id.*

13. The plaintiff having been nonsuited in an action for mesne profits, a rule was made absolute for a new trial, which was silent as to costs. Another action was commenced for the same mesne profits, in the name of *John Doe*, whereupon a rule was made absolute for staying proceedings therein, unless the previous action was discontinued. The plaintiff's attorney gave notice of trial in the first action, which was afterwards countermanded, and the defendant's attorney gave notice of trial by proviso, which was also countermanded. Subsequently the plaintiff discontinued :—*Held*, that the defendant was not entitled to the costs of the trial. *Sir W. H. Jolliffe, Bart. v. Mundy*, 413.

14. The party succeeding on a writ of error, is entitled to double costs of settling a bill of exceptions, and such costs are to be taxed in the Court of Error. *Francis v. Doe*, dem. *Harvey*, 488.

15. A plaintiff in ejectment who has obtained a verdict, which has been affirmed on error, is entitled to double costs of executing the writ of enquiry of mesne profits and damages. *Id.*

16. Costs in a bill of exceptions, are costs in a Court of Error. *Doe*, dem. *Harvey v. Francis*, 465.

17. Trespass for breaking and entering the plaintiff's close, and taking his straw. *Pleas*: first, not guilty; second, that the straw was not the property of the plaintiff; third, that the plaintiff carried away the defendant's straw and placed it upon his own close; and that the defendant entered the close to re-take it. A verdict was found for the plaintiff on the first issue, and for the defendant on the second. The third plea was demurred to, and judgment was afterwards given for the defendant. The judge did not certify under the 22 & 23 Car. 2, c. 9. *Held*, that as the plea of not guilty might be a statutory plea, under which the title to the freehold might come in question, that the plaintiff was entitled to no more costs than damages on the issue found for him. *Patrick v. Colerick*, 356.

18. Security for costs, given on the ground of the plaintiff's residing abroad, continues until the termination of the suit, even after he has become a permanent resident in this country. *Badnall v. Hayley*, 359.

19. Where a plaintiff sues in *forma pauperis*, the defendant is not entitled to set off the costs of the issues found for him. *Foss v. Racine*, 476.

20. *Semble*, that a party cannot be admitted to sue in *forma pauperis* after the commencement of the suit. *Id.*

COURT OF REQUESTS.

The *Blackheath Court of Requests' Act* excepts from the jurisdiction of the Court any debt "for any sum being the balance of an account originally exceeding 5*l.* :—*Held*, that this does not apply to accounts containing items amounting in the whole to more than 5*l.*, and reduced by part payments from time to time, so that at no one time was there so much as 5*l.* due. *Pope v. Baynard*, 144.

COVENANT.

1. By deed-poll, dated 21st October, defendant sold to the plaintiff a ship, with its tackle, &c., and covenanted that he had good right, full power, and lawful authority to grant, bargain, sell, assign, and set over the premises :—*Held*, that this was a covenant that the subject matter of the transfer existed in the character of a ship at the date of the deed, and if it was physically destroyed, or had ceased to answer the designation of a ship, the covenant was broken. *Barr v. Gibson*, 70.

2. The ship in question had got on shore on the coast of *Prince of Wales's Island*, on the 13th October, 1836, and was left by the crew beating on the shore. The crew had access to her afterwards. On the 14th October, the captain had her surveyed, and she was sold on the 24th. The ship had sustained no more damage on the 21st, than when she first struck. It was proved, that if there had been facilities, and at a different season of the year, she might have been repaired; and if in *England*, she might easily have been got off. When on shore, she was five feet above water on one side; on the other not so much, and her bulk ends were strained. Upon these facts, the Court were of opinion, that though she might be totally lost within the meaning of a contract of insurance, yet as she still existed as a ship, there was no breach of the covenant. *Id.*

DEVISE—See WILL.

DISTRESS.

1. A collector of the land-tax is not autho-

rized by the Statute 38 Geo. 3, c. 5, s. 17, to break open a dwelling-house for the purpose of a distress, without the assistance of a constable. *Foss v. Racine*, 403.

2. A boat was sent by the owner to certain salt works belonging to a salt manufacturer, and left a reasonable time in a canal, on the premises, for the purpose of being loaded with salt :—*Held*, that the boat was not privileged from distress. *Muspratt v. Gregory*, 184.

3. Goods of a stranger on the land may be distrained for a rent-charge issuing out of it. *Id.*

4. To an action against the defendant for wrongfully refusing to permit goods distrained by him to be appraised, the defendant pleaded that plaintiff was his tenant, and that he took the goods as a distress for arrears of rent :—*Held*, an issuable plea. *Sealey v. Harris*, 466.

EASEMENT.

1. In order to entitle a defendant to the benefit of the plea given by 2 & 3 Will. 4, c. 71, s. 2, he must prove an enjoyment of the easement as such, and as of right, for a continuous period of twenty years next before the suit. *Onley v. Gardiner*, 381.

2. Proof of unity of possession may be given in evidence under a traverse of the plea. *Id.*

EJECTMENT.

1. In ejectment, the lessor of the plaintiff was tenant in common with three of the defendants, who defended as landlords, and there were other defendants, (a railway company,) who defended as their tenants. The usual special rule had been obtained for admitting the landlords to defend, and to admit ouster, in case actual ouster should be proved. At the trial, it appeared that rent had been formerly paid to all the tenants in common, by certain other persons, but there was no evidence that such tenancy had been determined :—*Held*, that those who defended as tenants, were not precluded by the landlord's rule from contending that the legal estate was not in the lessor of the plaintiff, as the former tenancy might still exist. The premises in question were pulled down by the Railway Company, and a railway erected on their site. *Semble*, that this amounted to an actual ouster. *Doe*, dem. *Wawa v. Horn*, 75.

2. A Mining Company, in which the defendant below was a partner, applied to, and became tenants to the lessor of the plaintiff, in 1826, of certain premises. They were let into possession by him, and continued to occupy them during the term, paying him rent; and after receiving notice to quit, at the end of the

term, made proposals to retake them. They had never given up possession of the premises. At the time of granting the lease, the lessor of the plaintiff had no legal estate in the premises, but merely an equitable interest in one moiety. At the date of the demise laid in the declaration, and also at the time of the trial, he was a partner with the defendant below in the Company, but was not so at the time of granting the lease. *Held*, on a bill of exceptions to the ruling of the judge at the trial, *first*, that the defendant below was estopped from disputing the title of the lessor of the plaintiff. *Secondly*, that the lessor of the plaintiff was entitled to recover the entire premises. *Francis v. Doe, dem. Harvey*, 362.

3. In proceedings by ejectment under the 1 G. 4, c. 87, s. 1, the notice must require the tenant to appear in Court on the *first* day of Term, whether it be a country or a town cause. *Doe, d. Holder v. Rushworth*, 203.

4. Where, in a declaration in ejectment, there are two demises, an affidavit, which is entitled on the demise of one only of the lessors, is insufficient. *Doe, d. Couzens v. Roe*, 191.

EVIDENCE.

1. In trespass, where the question is as to the right to the possession of a certain close, the party who demised it to the defendant is a competent witness for him. *T. W.* held certain land, under a lease for lives, granted by *W.* At the expiration of the term, *T. W.* obtained the lease from *J.*, a stranger, and delivered it to *W.*, from whose custody it was produced at the trial:—*Held*, sufficient. *Reece v. Walters*, 110.

2. In an action by *C.* against *D.* for 60*l.*, the defendant paid that sum to the plaintiff's attorney; *C.* then sued the attorney for money received to his uses. At the trial, it appeared that *B.* was the real plaintiff in the first action, and that he had made use of *C.*'s name without his authority. The jury found that the 60*l.* was received for *B.*, in the name of *C.*:—*Held*, that *C.* could not recover that sum from the attorney. *Clarke v. Dignum*, 166.

3. Where a document has been put in by one party, and certain portions of it have been read at the desire of the opposite party, with a view to produce an effect upon the jury, it is too late for the latter party to object to its admissibility. *Layburn v. Crisp*, 326.

4. A decree of a Court of equity *in rem* referring to certain depositions, may be read in evidence, without the production of the depositions; but *Seemle*, that the depositions may be put in as the evidence of the opposite party. *Id.*

EXCISE.

A party whose goods have been *bond fide* seized by the officers of excise as forfeited, and who, without alleging the illegality of the seizure, spontaneously pays money to the commissioners of excise to obtain the restitution of them, cannot afterwards recover back the money so paid. *Atlee v. Backhouse*, 135.

EXECUTION.

Where a creditor has sued out a writ of *fi. fa.* against the goods of his debtor, and has afterwards abandoned it, he cannot, under the same writ, take the goods of the debtor in the hands of a *bond fide* purchaser. *Samuel v. Duke*, 127.

EXECUTOR.

1. Where a party is charged as executor *de son tort*, for having received a debt of the deceased to defray the funeral expences, it is a question for the jury whether he received a larger sum than was necessary for that purpose: if he did, he would be liable as executor *de son tort*. *Camden v. Fletcher*, 361.

2. The defendant's testatrix had successively employed two solicitors, *A.* and the present plaintiff, in a Chancery suit, for an account of the estate of a testator, in which she had an interest. The suit having been abandoned by *A.* and the plaintiff, their bills remaining unpaid, it was undertaken by *B.*, as the solicitor of the testatrix, and by him carried on till her death. The defendant, as her executor, revived the suit, and continued *B.* as his solicitor, who conducted it to a decree. A decretal order was made, directing the defendant's costs, which included those of the three solicitors, *A.*, the present plaintiff, and *B.*, to be paid to *B.*, his solicitor, out of the fund in Court. This fund proving insufficient, a rateable deduction was made in the costs of the parties, pursuant to the order, and a certain sum paid to *B.*, as the defendant's solicitor. The present plaintiff having brought an action for his costs against the present defendant, as executor of the testatrix, and having recovered judgment of assets *quando acciderint*, sued upon that judgment, but withdrew the record on the defendant's agreeing to pay him a certain sum at that time, and the residue of his claim out of the first assets of the testator which should come into his hands. *B.*, after the date of the agreement, had received from the officer of the Court of Chancery the sum of 84*l.* 8*s.* 8*d.*, in respect of the costs, and by the desire of the defendant, had paid to *A.* the amount of his bill, as well as the demand of other persons, accounting to the defendant for the residue:—*Held*, by *Parke, B.*, and *Alder-*

son, B., Lord *Abinger*, C. B., *dissentiente*, that the sum of 84l. 8s. 8d. was assets in the hands of the defendant. *Smiedley v. Philpot*, 302.

GAMING.

Money lent to enable another to play at an illegal game, cannot be recovered back. *M'Kinnell v. Robinson*, 146.

HABEAS CORPUS.

An application for a *habeas corpus* must be supported by an affidavit of the party applying, unless it appear to the Court that such affidavit cannot be obtained. *In re Canadian Prisoners*, 462.

HUSBAND AND WIFE.

A husband living apart from his wife, and allowing her a separate maintenance, is not liable for necessaries supplied to her. And it is immaterial that the party supplying her has no knowledge of the separate maintenance. *Mizen v. Pick*, 163.

INFORMATION.

An information in the nature of the popular action of debt, cannot be maintained for arrears of assessed taxes, inasmuch as the 5 & 6 Will. 4, c. 20, s. 13, provides that the amount shall be recoverable "as a debt upon record." The proper proceeding is by *scire facias*, extent, or by information on the record itself. *Attorney General v. Sewell*, 262.

INNKEEPER.

An innkeeper cannot, in default of payment of his bill, detain either the person of his guest or the clothes he is wearing. *Sunbulp v. Alford*, 13.

INSOLVENT.

1. In a plea of discharge under the Insolvent Debtors' Act, the plaintiff replied, that although he was named in the defendant's schedule, "yet he did not, at any time before the making of the said order, have any notice whatever of the filing of the petition upon which the defendant applied for his discharge, and of the said schedule, and of the time and place appointed for hearing of the matters of such petition and schedule." The replication was held ill, on the ground that it was not

shewn that the plaintiff was ignorant of the petition, the filing of the schedule, and of the time and place of hearing; and also, that it did not appear that he was entitled to any notice, there being nothing to shew that his debt amounted to the sum of 5l. *Troup v. Boff*, 126.

2. *A.* being in difficulties, and having been served with writs by several of his creditors, applied to the defendants, who were attorneys, for their advice and assistance. After several ineffectual attempts to make an arrangement, it was finally resolved, at a meeting of the creditors, that *A.*'s property should be immediately sold; thereupon *A.* employed an auctioneer for that purpose, and directed him to pay the balance of the proceeds (after deducting his own charges) to the defendants, which was accordingly done. Another meeting of the creditors took place, at which 5s. in the pound was offered, which being refused, *A.* went to prison, and obtained his discharge under the Insolvent Act. The defendants claimed to retain a portion of the money paid to them by the auctioneer in discharge of their bill of costs:—*Held*, in an action by the assignees to recover the money, that this was not a voluntary transfer in favour of a particular creditor, within the meaning of 32d section of the 7 G. 4, c. 57. *Wainwright v. Clement*, 395.

3. In order to support a transfer by an insolvent debtor, it is not necessary that there should be a *pressure* on the part of the creditor; but if the transfer be made in pursuance of a *bond fide* demand by the creditor, it is not within the 7 Geo. 4, c. 57, s. 32. *Mogg v. Baker*, 461.

4. The lessee of certain premises, at a rack rent, being insolvent, executed an assignment to defendants, by which, after reciting his insolvency, and that he had agreed to assign "all his debts, personal estate, and effects of every description for the benefit of his creditors, he conveyed and assigned to the defendants all and singular the stock in trade, implements, *crops of every kind, as well severed as not*, and personal estate of every description whatsoever, in, upon, and about the said premises then in his use or occupation, &c. (except the wearing apparel of himself and family), and also all debts, securities, &c., and all other his personal estate and effects whatsoever and wheresoever, *habendum* in trust out of the proceeds: first, to pay the expenses of the assignment; secondly, to pay the rent due and in arrear for the premises, or accruing due until and up to the 6th April then next; and thirdly, to distribute the residue for the benefit of the creditors:—*Held*, that the words of the assignment were sufficiently large to comprehend the lease; and it being the intention of the parties to include all the insolvent's property, and the jury having found that the

assignees had accepted the lease, it passed to them under the assignment. *Ring v. Cann*, 67.

5. The assignees of a bankrupt or insolvent take such property only as he was equitably, as well as legally, entitled to at the time of the bankruptcy or assignment; therefore, if *A.* agree to assign certain specific goods as security for money advanced, and afterwards take the benefit of the Insolvent Debtors' Act, having within three months before the imprisonment "voluntarily" assigned the goods in pursuance of such agreement, the assignees are not entitled to recover them; but if the agreement had been to assign such goods as he might have at the time of the execution of the assignment, the assignees would be entitled to them. *Mogg v. Baker*, 55.

INTERPLEADER.

An execution creditor, appearing under the Interpleader Act, need not produce an affidavit. *Angus v. Wootton*, 46.

LANDLORD AND TENANT.

A yearly tenant, believing that his tenancy expires at *Midsummer*, gave his landlord a written notice of his intention to quit at that time. The tenant having afterwards discovered that his tenancy did not expire until *Christmas*, gave a fresh notice for that period, and on possession being demanded at *Midsummer*, refused to quit.—*Held*, that the tenancy was not determined by the first notice, and that it could not operate as a surrender within the Statute of Frauds, it being to take effect in futuro. *Doe*, dem. *Murrell v. Milward*, 79.

LAND-TAX.

Certain property, situate in the parish of *H.*, was assessed to the land-tax in that parish. The tenant of this property being afterwards assessed in the parish of *G.* in respect of the same property, refused to pay, and being returned by the collector as a defaulter, three writs of *levari facias* issued to the sheriff, under which his goods were sold, and the proceeds ultimately paid over to the receiver-general. An application having been afterwards made to set aside the writs of *levari facias*, the Court discharged the rule. *In re Glatton Land-tax*, 430.

LEASE.

By a written instrument, dated the 25th February, 1782, *E. S.* agreed to let to a committee, in trust for the parish of *H.*, certain pre-

mises, to be used as a poor-house, upon the following terms:—"To hold unto the said committee in trust as aforesaid, from the 25th day of *March* next coming, for the term of ninety-nine years, at the clear yearly rent of 27*l.*, payable half-yearly, by equal portions. And the said committee do hereby agree to pay the said rent accordingly; and also to pay and discharge all assessments and taxes whatsoever, with all quit-rents, &c. for and in respect of the said premises; and also to keep the premises in good and sufficient repair during the term. And the parties do agree that a lease and counterpart of the premises shall be prepared and executed on or before the 1st January next ensuing, with covenants and agreements pursuant to the present contract; and such other general clauses as are usually contained in leases: Provided, that in case the said committee, or the major part of them, or their successors, shall think it more eligible to purchase in fee the said messuage and premises for the use of the said parish of *H.*, at the price of 420*l.*, that then he, the said *E. S.*, shall accordingly convey the same premises in such manner as the counsel or attorney of the said committee shall advise and require." The churchwardens and overseers of *H.*, on behalf of the parish, entered upon the premises in question in 1819, and paid rent to the plaintiffs up to the year 1835, when the Poor Law guardians took possession of the premises. The plaintiffs became entitled to the reversion in 1801. The defendants were the churchwardens and overseers of the poor at the date of the action, but not at the time when the parish was in possession of the premises, and when the dilapidations accrued. An action having been brought against the defendants for a breach of the agreement to repair:—*Held*, first, that the instrument operated as a present demise; and secondly, that the term vested in the overseers for the time being, and, therefore, that the plaintiffs were entitled to recover. *Alderman v. Neate*, 369.

LEGACY DUTY.

A., by his will, devised certain manors, hereditaments and tenements to certain tenants, for life, in succession, with a power to each of them, when in possession, to charge the estates by will, with an annuity in favour "of any woman with whom they might respectively have intermarried. Some time after the death of the testator, the estates descended upon a tenant for life, who exercised this power of appointment in favour of his wife:—*Held*, that this annuity was liable to legacy duty. *Attorney General v. Pickard*, 174.

LIBEL.

1. Libel. The declaration contained four counts, the two first of which set out libels

contained in the former numbers of a newspaper. The third count was to this effect, "And the defendant afterwards further contriving, &c., and to cause it to be believed that the plaintiff was guilty of fraud, &c., in a subsequent number of the newspaper published the false, libellous, &c. matter following, of and concerning the plaintiff, that is to say, 'we again assert the cases formerly put by us on record; we assert them against *A. S.* and *Achilles Hughes* (by the latter meaning the plaintiff), that they are such as no gentleman or honest man would resort to.'" There was no introductory statement of the "cases." The jury having found a general verdict for the plaintiff, and a motion in arrest of judgment having been made:—*Held*, first, that the third count was to be considered as a separate and distinct count. *Secondly*, that after verdict, the words in question must be considered libellous. *Hughes v. Rees*, 197.

2. The declaration stated that the plaintiff was an attorney, and that certain orders had been made by one of the judges of *Q. B.* for setting aside proceedings, with costs, in an action in which the plaintiff was the attorney of the then defendant, and that the costs were taxed by one of the Masters. That *sharp practice* in the profession of an attorney is, and is considered to be and to import disreputable practice, and discreditable to the attorney adopting it. Yet the defendant intending to cause it to be believed that the plaintiff had been guilty of sharp practice in the said action, and had been reprimanded for it by the Master, published of him the following false, *ironical*, and libellous matter:—"An honest lawyer," (thereby meaning the plaintiff, and intending to represent that he was not an honest lawyer). "A person of the name of *C. B.* was severely reprimanded the other day by one of the Masters of *Q. B.* for what is called sharp practice in his profession" (meaning and alluding to the plaintiff's practice with respect to the said orders; and that such practice was sharp practice as aforesaid):—*Held*, that the charge that the plaintiff had been guilty of *sharp practice*, as explained by the prefatory averment, was clearly libellous. *Boydell v. Jones*, 408.

3. *Semble*, that the allegation that the defendant *ironically* called the plaintiff an honest lawyer, coupled with the *innuendo*, was sufficient to shew that the term was used in a libellous sense, without any prefatory averment. *Id.*

4. On special demurrer to a plea, if the defendant objects that the declaration is bad, and any part of it is good upon general demurrer, the plaintiff is entitled to judgment. *Id.*

LIEN.

A set-off is no answer to a lien, unless there

be a specific agreement between the parties that the one debt shall be set off against the other. *Pinnock v. Harrison*, 114.

LIMITATIONS, STATUTE OF.

1. An unstamped promissory note cannot be used as an acknowledgment under the 9 G. 4, c. 14, to take a debt out of the Statute of Limitations. A mere parol statement by the parties, within six years of the commencement of the suit, of a debt previously existing and ascertained, is not sufficient to support a count on an account stated, so as to defeat the Statute of Limitations. *Jones v. Ryder*, 256.

2. The plaintiff having a cause of action against *B.* in May, 1829, the latter died in 1830, no action having been commenced against him. Some litigation took place respecting his will, and in June, 1835, administration of the effects of the deceased was granted to the defendant, and in September, 1835, the plaintiff commenced his action:—*Held*, that the debt was barred by the Statute of Limitations, and that the plaintiff was not entitled to deduct from the six years the time between the death of *B.* and the grant of administration to the defendant. *Rhodes v. Smethurst*, 237.

3. Messrs. *M.*, the plaintiffs, applied by their agent to the defendant for a settlement of their account; to which the defendant wrote the following answer: "Since the receipt of your letter, and indeed for some time previously, I have been almost in daily expectation of being enabled to give a satisfactory reply to your first application, respecting the demands of Messrs. *M.* on me. I propose being in *Oxford* to-morrow morning, when I will call upon you on these matters."—*Held*, that this was not a sufficient acknowledgment to take the case out of the Statute of Limitations, and that the meaning of the letter was a question of law, to be determined by the judge in the first instance. *Morrell v. Prith*, 100.

NEW TRIAL.

N. D., previously to 1832, had attended Mrs. *H.* during a serious illness; in 1832, she married the plaintiff, and he then ceased to attend her. At the time of the making of the policy, *E. E. D.* was the medical adviser of her husband, the plaintiff, but had attended her only once or twice, for a slight indisposition. On the issue, that *E. B. D.* was not her "usual medical attendant," the judge directed the jury to consider whether *N. D.* or *E. E. D.* was her usual medical attendant:—*Held*, that the judge should have required the jury to say further, whether *E. E. D.* could be considered her usual medical attendant at all; and on the ground of his omission so to direct the jury to do so, the Court granted a new trial. *Huckman v. Fernie*, 149.

NOTICE OF ACTION.

The declaration stated, that the defendants were proprietors of a certain railway, for the carriage of passengers, cattle, &c., from *Liverpool to Birmingham*; that the plaintiff delivered to them nine horses to be carried on the railway; yet the defendants took so little care in and about the carrying and conveying the said horses, and in conducting, managing and directing their carriages upon the railway, that the carriages were thrown down an embankment, and one of the horses killed, and the others injured, &c. The company was incorporated by Act of Parliament for the purpose of making a railway; and there was a clause enabling them to become carriers if they should think fit. It was also provided, that no action should be brought for "any thing done or omitted to be done," in pursuance of the Act, unless fourteen days' previous notice was given. It appeared that the accident was caused by a horse having strayed from the adjoining field, and laid down on the railway, and that the fence, separating the field from the railway, had been removed by some workmen of the company:—*Held, first*, that no notice of action was necessary; *secondly*, that an objection to the form of declaration should have been taken at the trial, in which case it might have been amended. *Palmer v. The Grand Junction Railway Company*, 489.

OFFICER.

The *Gravesend Pier Act* (3 & 4 Will. 4, c. 101, s. 18,) empowers the corporation to appoint clerk, treasurer, and such other officers or assistants as they may think necessary for the purposes of the Act. Section 19 prohibits the corporation from appointing the clerk, in the execution of the Act, the treasurer for the purposes of the Act, and a penalty is imposed on the clerk, or his partner, or clerk who shall in any manner officiate for the treasurer:—*Held*, that the corporation had no power to appoint an assistant treasurer, but where they had appointed the clerk of the clerk to that office, it was a question for the jury whether he had acted *bond fide*, believing himself an independent officer, or colourable in evasion of the Act. *Hawkins v. Newman*, 471.

OUTLAWRY.

The plaintiff having arrested the defendant on a writ of attachment out of *Chancery*, lodged with the sheriff a *capias utlagatum* against him. The attachment was afterwards set aside by the Master of the Rolls as irregular:—*Held*, that the defendant, who had been detained in prison, was entitled to be discharged out of custody on the writ of *capias utlagatum*. *Hall v. Hawkins*, 448.

PARTNER.

A. and *B.* entered into partnership as attorneys, and it was agreed that *B.* should receive 300*l.* a year out of the profits, but he was not to be liable in any manner for the losses of the business, and was to have a lien on the profits for any losses he might sustain by reason of his liability as a partner:—*Held*, that *A.* and *B.* were properly joined as plaintiffs in an action for work and labour. *Bond v. Pittard*, 82.

PLEADING.

I. DECLARATION.

1. Where a defendant was sued as executor for goods sold, for work and labour, for money paid, and on an account stated:—*Held*, that he was not liable in his representative character on the two first counts, and that, therefore, there was a misjoinder. *Semble*, that the plaintiff could not have recovered upon the two first counts, supposing the goods, or the work and labour, to have been contracted for by the testator, and the contract to have been completed by the plaintiff in the time of the executor. *Corner v. Shew*, 65.

2. Where to counts for money lent, money had and received, and money due on an account stated, there was one demurrer, on the ground that they did not specify any time, the Court set aside the demurrer as frivolous. *Jackson v. Crawley*, 4.

3. Declaration in slander stated, that the plaintiff was clerk to a mining company, and that the defendant intending to cause it to be believed that plaintiff had been guilty, in the course of his said employment, of grave crimes and felonies, heretofore, to wit, on the 1st *July*, 1836, in a discourse concerning the plaintiff, and of and concerning his having acted as such clerk, spoke of and concerning the plaintiff these words: "You have done things with the company for which you ought to be hanged, and I will have you hanged before the 1st of *August*," (thereby meaning that the plaintiff had been guilty of felonies punishable by law with death by hanging.)—*Held*, on motion in arrest of judgment, that the declaration was good. *Francis v. Roose*, 36.

4. The declaration set out the writ, which stated the action to be brought on promises. Then followed two counts, which alleged the making of two bills of exchange by the plaintiff, and that the defendant accepted the bills, and promised the plaintiff to pay the same: there were also *indebitatus* counts, and the declaration concluded, "whereby and by reason of the non-payment thereof, an action hath accrued to the plaintiff to demand and have of and from the defendant the said several monies respectively, amounting to the sum of 450*l.*,

above demanded:—*Held*, a good declaration in debt. *Compton v. Taylor*, 222.

5. In a count, on an account stated, it is not necessary to allege any time when the account was stated. *Leaf v. Lees*, 478.

6. The declaration stated, that in consideration that the plaintiff would forbear to sue *J. D.*, and would receive from him certain promissory notes, the defendant undertook that if the notes should be dishonoured, and the plaintiff should issue a writ of *capias* or detainer against *J. D.* in respect of them, he would surrender *J. D.* into the custody of the sheriff of *Middlesex*, or some other county, so that he might be arrested or detained on such writ, or in default thereof, that he, the defendant, would pay the plaintiff the amount of the notes:—*Held*, that this was a legal contract. *Lewis v. Davison*, 425.

7. The declaration averred that the plaintiff received from *J. D.* ten notes, drawn and indorsed by *J. D.*:—*Held*, that it was unnecessary to state that the notes were indorsed by *J. D.* to the plaintiff. *Id.*

8. A plea justifying an assault committed in removing the plaintiff from the defendant's dwelling-house, because he was making a disturbance there, is not supported by proof of an assault in a room which the defendant occupied as a lodger, the plaintiff being his landlord, and residing in the house. *Monks v. Dyke*, 418.

9. The declaration stated, that whereas the defendants were tenants to the plaintiff of a farm and lands, and by reason thereof it was their duty to manage and use the lands in an husband-like manner, according to the custom of the country; yet the defendants did not manage and use the lands in an husband-like manner, &c. The defendants pleaded, first, not guilty; secondly, *non tulerunt modo et forma*:—*Held*, that, under the latter issue, the tenancy alone was denied, and that the plaintiff was not bound to prove that the defendants had not used the lands in an husband-like manner, and according to the custom of the country. *Halifax v. Chambers*, 417.

10. Where the declaration contains several counts, it is not necessary in a plea of set-off of a smaller sum, to specify to which particular part of the plaintiff's claim the set-off is to be applied. *Noel v. Davis*, 206.

11. The declaration stated, that by a memorandum of agreement between the plaintiff of the one part, and the defendants of the other (after reciting that by a certain other agreement between the plaintiff and the defendants, the plaintiff did agree with the defendants for the sale of *W.*'s patent furnace, and that plaintiff and one *C.* had obtained a patent for an improvement in generating steam, and the plaintiff and one *J.* a patent for a metallic wheel and revolving axle, and that the plaintiff was solely interested in a patent for a new

mode of abstracting heat from steam vapour; and that the plaintiff and one *G.* had obtained a patent for an improved furnace;) it was agreed between the parties, that it should be lawful for the defendants exclusively to use, manufacture, sell and dispose of any or all of the aforesaid patent inventions, upon this, among other considerations, that the defendants should pay to the plaintiff 400*l.* a year during the existence of the said agreement. *Breach*, non-payment. *Pleas*, as to the patent for the said supposed improvement in furnaces, that it was not a new invention, and that the supposed improvement in furnaces was not invented or found out by the plaintiff:—*Held*, on special demurrer, that as it did not appear by the declaration that the defendants ever enjoyed any part of the patents, which was the consideration for their agreeing to pay 400*l.* a year, or that that sum could in any way be apportioned among the different patents, that the plea impeaching the consideration, was good, to avoid the whole contract. The memorandum of agreement was stated to be made between *J. C.*, *J. M.*, *J. I.* and *J. G.*:—*Held*, that there was a variance between the declaration and contract, in not setting out all the contracting parties. *Semble*, that the contract being with all the parties, founded upon a consideration, to part of which each was a concurring party, the action ought to have been by all. *Chanter v. Lease*, 224.

12. In an action for work and labour as an apothecary, the plaintiff, under the general issue, must prove his certificate, or that he was in practice before the 5th August, 1815. *Sharpe v. Wegstaff*, 164.

13. The 1 Vict. c. 107, s. 28, (the Western Railway Act,) enacted, "That whereas the intended railway and works are intended to pass nearly contiguous to a mansion-house and twelve acres of land, 'belonging to *William Penney, Esq.*' be it enacted, That in case the said *William Penney*, by notice in writing, shall require the said company to purchase the said mansion-house and land, it shall be lawful for them, and they are required to treat for the purchase thereof, and for the compensation to be made to the said *William Penney*, his heirs, &c., in respect of the same; and in case the parties shall not agree as to the value, or the compensation to be given, then the amount shall be ascertained by the verdict of a jury; and in case default shall be made by the company in payment of the sum or sums to be settled and agreed upon, or ascertained by the verdict of a jury, for the space of two calendar months after the same shall have been settled, agreed upon or awarded, then it shall be lawful for the person to whom such money ought to be paid, to sue for and recover the same by action of debt, in any of her Majesty's Courts at Westminster." Under this section a jury was impanelled, and awarded 7,502*l.* as a compensation to the plaintiff. The declara-

tion stated that the plaintiff, by a notice in writing, left at the office of the defendants, required them to purchase a certain mansion-house and land belonging to him, the plaintiff, and mentioned in the Act of Parliament. It then stated the summoning of the jury, and that they gave a verdict for 7,502*l.* as compensation to the plaintiff; and that long before the commencement of this suit, two calendar months had elapsed after the time at which the amount had been awarded, that the defendants had not paid, but therein had wholly failed and made default. *Pleas*: first, that from the time when the compensation was so awarded, the defendants had always been ready to pay the sum, upon the plaintiff's making or shewing a good and sufficient title. *Secondly*, that at the time the jury ascertained the said sum of 7,502*l.*, and from thence hitherto, the plaintiff had not any good and sufficient title to the mansion-house and lands:—*Held*, upon demurrer to the pleas, that it was consistent with the declaration that the plaintiff might have parted with his title after the passing of the Act, and that the declaration was insufficient, for not shewing a default of payment pursuant to the Act of Parliament. *Semble*, that the words, "belonging to William Penney, Esq.," were not conclusive of the plaintiff's title. *Penney v. The Great Western Railway Company*, 247.

PLEAS.

14. To ease by reversioner, for an injury to a close in the possession of his tenant, the defendant pleaded, that before the close was the plaintiff's, it was agreed between the defendants and D. and C. (the owners in fee,) that the defendant should have licence to enter the close and make a certain road, and that D. and C. should grant, ratify and confirm the same to the defendants; that the defendants entered for the purpose of making the road; and that afterwards, in pursuance of the said agreement and of the said possession, C. and D., by indenture, granted and demised, and granted, ratified and confirmed to the defendants, such liberty to enter upon the said close and make the road. *Held*, that the plea was bad on special demurrer, for not shewing the precise operation of the deed. *Wallis v. Harrison*, 405.

15. A parol licence from A. to B. to go upon the land, is countermandable at any time, whilst it remains executory. And if A. conveys his interest in the land to another, the licence is determined without notice to B. *Id.*

16. The want of profit is not excused by an averment that the deed was delivered to the opposite party. *Id.*

17. To an action on a promissory note at twelve months' date, the defendant below pleaded, that one J. W., at the time of his death, was indebted to the plaintiff below in a

sum of money for goods sold and delivered, and that the plaintiff, after the death of J. W., and before the making of the note, applied to defendant for payment, whereupon in compliance with the request, the defendant, after the death of J. W., for and in respect of the said debt, and for no other consideration whatever, then made and delivered the note to the plaintiff; that J. W. died intestate, and that at the time of the making and delivery of the note, no administration had been granted of the estate and effects of J. W., nor was there at that time any person liable for the said debt; and that there was never any consideration for the said debt except as aforesaid:—*Held*, on error, (after judgment for the plaintiff *non obstante veredicto*.) that the plea sufficiently negated a consideration for the debt, and that judgment ought to be reversed. *Nelson v. Serle*, 456.

18. To *assumpsit* for money received to the use of the assignees of a bankrupt, the defendant pleaded, that the money was received before the bankruptcy, and that the bankrupt was indebted to him in a sum which he claimed to set off:—*Held*, bad. *Wood v. Smith*, 491.

19. The plea of Not Guilty is a good plea to an action by a landlord on 11 Geo. 2, c. 19, s. 3, for assisting a tenant in the fraudulent removal of his goods. *Jones v. Williams*, 348.

20. Where there are several pleas, each must be taken as if it stood alone upon the record. Therefore where, in *assumpsit*, the defendant pleaded the general issue, and also paid money into Court, and a verdict was found for him on the first issue:—*Held*, that the admission in the plea, of payment into Court did not entitle the plaintiff to have a verdict entered for him on the other issue. *Twenlow v. Askey*, 172.

21. In an action for negligent management of a train of railway carriages, the defendant pleaded that the action arose as well from the negligence of the persons who had the management of the train in which the plaintiff was, as from the negligence of the defendant:—*Held*, that the plea was bad in substance as well as form. *Bridge v. Grand Junction Railway Company*, 26.

22. A covenant not to sue for a limited period on a simple contract debt, is not pleadable in bar to an action for such debt. *Thimbleby v. Barron*, 61.

23. *Nil debet* is a good plea to an action of debt on the 2 & 3 Edw. 6, c. 13, for treble value for not setting out tithes. *Earl Spencer v. Swannell*, 56.

24. The declaration stated, that defendants were owners of a certain vessel, and that plaintiff caused to be shipped on board thereof certain goods, to be safely carried by the defendants as owners of the said vessel; that the defendants promised the plaintiff safely to carry the said goods, as aforesaid:—*Held*, that

under the plea of the general issue, the ownership of the defendants was not admitted. A plea denying a particular fact does not admit other immaterial allegations. *Bennion v. Davidson*, 46.

25. The declaration stated, that the sheriff had seized goods of the plaintiff under a *fi. fa.* issued upon a judgment, and signed by virtue of a warrant of attorney given by the plaintiffs and one *R.*, to one *S.*, as trustee for the defendant, and as security for monies due from the plaintiffs and *R.* to the defendant, and thereupon, it was agreed, that the plaintiffs should give the defendant two several warrants of attorney for specific sums, and that the defendant should procure the goods and chattels to be re-delivered to the plaintiffs: that plaintiffs gave the warrants of attorney, but that the defendant did not cause the goods to be re-delivered. *Plea*, that the warrant of attorney in the declaration mentioned to have been executed by the plaintiff and *R.*, was not given for the use and benefit of the defendant, or to *S.* as his trustee:—*Held*, that the plea was bad, as traversing an immaterial issue. *Held*, also, that it was not necessary to set out the warrants of attorney, or to aver a request to re-deliver the goods. *Radford v. Smith*, 42.

26. Where there is a joint contract for several articles of different descriptions, an acceptance of any one of them is a sufficient part acceptance of the whole to satisfy the 17th section of the Statute of Frauds. The defence that there was no sufficient contract within the Statute of Frauds, may be taken advantage of under the general issue. *Elliott v. Thomas*, 38.

27. In an action of trover brought by the *bond fide* purchaser of goods against the sheriff and the execution creditor for seizing under a *fi. fa.* which had been abandoned by the creditor, the defendants pleaded jointly not guilty, and that the plaintiff was not possessed of the goods as of his own property. *Held*, that as the plaintiff had a right to treat the seizure as the act of conversion, the sheriff could not under those pleadings shew that he had a right to seize the property. *Samuel v. Duke*, 127.

28. A plea of set-off stated, that "before, and at the time of the commencement of the action," the plaintiff was indebted to the defendant, but omitted to add, "and still is indebted:"—*Held*, bad on special demurrer. *Dendy v. Powell*, 107.

29. In an action against the sheriff for not levying under a *fi. fa.*, the plea not guilty, admits the judgment, the writ, the delivery of it to the sheriff, that there were goods in his bailiwick, and that the defendant had notice of it. The only defence available under that plea is, that he did levy within a reasonable time, and that he did not make the return alleged. *Lewis v. Alcock*, 17.

30. Payment cannot be given in evidence under a plea of set-off for money paid. *Cooper v. Morecroft*, 105.

GENERALLY.

31. Debt will not lie on a collateral covenant for the payment of an annuity issuing out of land. *Randall v. Rigby*, 231.

32. Trover will not lie for fixtures. *M'Kintosh v. Trotter*, 20.

33. The plaintiff gave a written authority to the defendant, his solicitor, to sell the life interest which the plaintiff's wife had in certain stock, standing in the name of trustees to her former marriage settlement, and out of the proceeds to pay to *W. C. B.* the sum of 169*l.* The plaintiff also directed the defendant to prepare a settlement of other property belonging to the plaintiff, with power to dispose of it in a certain specified manner. The defendant and others were to be trustees. The defendant had applied 169*l.* in the manner directed by the plaintiff, and had also disposed of other sums. The plaintiff having been nonsuited in an action for money had and received, brought against the defendant for the balance of money remaining in his hands: the Court *held*, first, that the proceeds of the property, which was originally trust property, did not constitute money had and received to the use of the plaintiff; secondly, that the defendant was trustee of the proceeds, and they refused to set aside the nonsuit. *Mileham v. Eicke*, 102.

34. To an action by an assignee of an insolvent for money had and received, the defendant pleaded that the insolvent and his partner were indebted to the defendant in 45*l.* 18*s.* for money lent, money paid, and interest, and that an account was stated between them concerning this sum; that the defendant set off and allowed to the insolvents the said sum, and exonerated and discharged them from the payment thereof in full satisfaction and discharge of the promises in the first and second counts as to the said sum, which set-off and allowance the insolvents accepted in full satisfaction and discharge. Replication, that the insolvents were not indebted to the defendant in manner and form, &c.—*Held*, that the replication was good; for that the plaintiff, by traversing the debt, had in fact traversed the account stated. *Learmonth v. Grandin*, 424.

35. A plea delivered the day after the time for pleading has expired, but bearing date of the previous day, is not a nullity, but merely an irregularity. *Hodson v. Pennell*, 358.

36. A defendant took down a record by proviso, and entered the cause under the entry of the plaintiff. The plaintiff withdrew his record, and the defendant afterwards agreed that his cause should be made a remanet.—*Held*, that the defendant was not entitled to the costs of the day. *Blow v. Wyatt*, 359.

37. Where the wife of a lunatic, against whom no commission of lunacy had issued, had instructed an attorney to bring an action in her husband's name, and the defendant had paid money into Court:—*Held*, that she was entitled to have the money paid out to her. *Rock v. Slade*, 346.

38. To a declaration on two bills of exchange drawn by *M.* upon and accepted by the defendant, and indorsed by *M.* to the plaintiffs, the defendant pleaded, that being in embarrassed circumstances, by an instrument in writing, he agreed to pay *M.* and his other creditors a composition of 7s in the pound. The plea averred payment of the composition, and that before the commencement of the suit, *M.* paid to the plaintiffs sums of money sufficient to satisfy all consideration whatever for or in respect of the bills, and all money due from him to the plaintiffs in respect of the bills, in full satisfaction and discharge of the bills, and of all claims and demands whatsoever in respect of them. *Replication, de injuriâ*:—*Held*, that the replication was bad, as the plea amounted to matter of discharge, and not of excuse. *Jones v. Senior*, 210.

39. A plea in abatement of the coverture of the defendant, is not a plea of non-joinder, within the meaning of the 3 & 4 W. 4, c. 42, s. 8. *Jones v. Smith*, 167.

40. An improper ruling of a judge, as to the right of a party to begin, may, in certain cases, be a ground for a new trial. The plaintiff had stated, in answer to certain printed questions, that his wife (the life insured) had not been afflicted with certain disorders. His wife attended at the insurance office, and made the same statement. On the issue, that the wife had been afflicted with certain disorders, and that the fact was known to the plaintiff, the jury negatived the plaintiff's knowledge:—*Held*, that the knowledge of the wife that her statements were false, could not be considered as the knowledge of the plaintiff: that she was not his general agent, but only his agent for the purpose of answering such questions as the insurance office might propose. *Semble*, that the general agency of the wife, supposing it to be a good defence, ought to have been specially pleaded. *Huckman v. Fernie*, 149.

41. To *assumpsit*, for money paid, &c., the defendant pleaded as to 500*l.*, parcel, &c. That on the 11 *January*, they were possessed of a bill of exchange, drawn by them upon, and accepted by one *M.*, for payment to their order, 500*l.*, six months after date; and thereupon, in consideration that defendants would indorse the bill to plaintiff, be agreed to lend to, or pay, lay out and expend 500*l.*, in such sums, and in such manner, as the defendants should direct; and to hold the bill for and on account, and as payment of the said sum of 500*l.* *Averment*, that defendants indorsed the bill,

and that the plaintiff took it, and holds the same on account, and as payment of the said sum of 500*l.*; that the sum of 500*l.*, parcel, &c., is made up of divers sums of money paid, laid out and expended for the defendants, on account of the said bill, and in pursuance of the said promise and agreement:—*Held* bad, as amounting to the general issue. *Maude v. Nesham*, 159.

42. A declaration in debt contained five counts for 15*l.* each, and giving credit for parcel of the monies, claimed a balance of 65*l.* The particulars gave credit for 10*l.* 13*s.*, and claimed a balance of 12*l.* 19*s.* 6*d.* The defendant pleaded *nunquam indebtedatus*, except as to 10*l.* 13*s.*, parcel, &c. *Secondly*, as to 10*l.* 13*s.*, payment. *Thirdly*, as to 10*l.* 13*s.*, payment of that sum into Court, in discharge of the causes of action in the declaration mentioned; to which the plaintiff replied, by accepting the sum paid into Court:—*Held*, that the defendant was entitled to sign judgment of *non pros*, for want of an answer to the other pleas. *Emmott v. Standen*, 173.

43. Where there is a good and a bad count, and a general verdict is found for the plaintiff, the Court will not arrest the judgment, but will grant a *venire de novo*. *Airey v. Fearn-sides*, 202.

44. Where a declaration contains several counts, which are misjoined, and the jury find a verdict for the plaintiff on all the counts, the Court will not grant a *venire de novo* on the ground of the misjoinder. *Corner v. Shew*, 215.

45. The Court having, at the instance of the defendant, arrested the judgment on the ground of misjoinder, the plaintiff immediately applied for, and obtained a rule to shew cause why a *venire de novo* should not be granted:—*Held*, that he was not too late in his application; and that he was entitled to be heard in support of the rule. *Id.*

46. The defendant drew his cheque on the Bank of *England*, and paid it into the hands of the plaintiffs, the bankers of a mining company, to the account of the company. The plaintiffs having lost the cheque, applied to the defendant for another, offering him an indemnity. The defendant agreed to give another cheque:—*Held*, that an action for money paid would not lie against the defendant for the breach of this agreement, but that the plaintiff's remedy was by action of special *assumpsit*. *Lubbock v. Tribe*, 160.

47. Where the replication *de injuriâ* is inapplicable, the objection can only be taken on special demurrer. *Parker v. Riley*, 5.

48. To an action for work done by the plaintiff's testator, as an attorney, defendant pleaded that the work was done by one *R. S.*; that *R. S.* was unqualified to act as an attorney; and that the plaintiff's testator knowing,

R. S. to be unqualified, permitted him to use his name for the profit of R. S.:—*Held*, that the replication *de injuriâ* was bad. *Id.*

49. To *indebitatus assumpsit* for goods sold and delivered, and on an account stated, the defendant pleaded as to 18s. 6d., parcel, that they were sold on a *Sunday*, in the way of the plaintiff's trade and business. *Replication*, that although the goods were sold at the time, and in the manner stated, still, that the defendant kept and detained the same, without offering to return them, whereby he became liable to pay for them on a *quantum valebant*. On demurrer to the replication, it was held bad, on the ground that it ought to have shewn a new promise to pay after the retaining of the goods by the defendant. *Simpson v. Nicholls*, 12.

50. The first count of the declaration stated that the defendant engaged the plaintiff as a courier and a travelling servant, for five months certain, at the rate of ten guineas a month, and agreed, that in case she, the defendant, should discharge the plaintiff before the end of the five months, to pay him the fifty guineas, and the expences of his journey back to *England* or *Paris*. *Averment*, that plaintiff entered the service of the defendant, and continued therein for two months, and was willing to remain, but that the defendant discharged him at *Carlsbad*, and refused to pay him the fifty guineas, or his expences to *England* or *Paris*. *Second count*, for wages, as the servant of the defendant. *Plea*, as to the first count, except as to 21*l.*, that plaintiff absented himself from the service of the defendant without her consent; secondly, to the first count, except as to the said sum of 21*l.*, that plaintiff disobeyed the lawful order of the defendant; thirdly, to the second count, except as to 21*l.*, *non assumpsit*; lastly, payment into Court of 34*l.* 18s. The plaintiff joined issue on the first and third pleas, and replied to the second, *de injuriâ*, and to the last, *damages ultra*. The jury found for the plaintiff on the first and fourth issues, and for the defendant on the second and third:—*Held*, that on this record the plaintiff was entitled to a verdict for nominal damages. *Fischer v. Aide*, 168.

51. Where to an action of debt for goods sold, and work and labour, the defendant pleads generally payment of a sum of money equal to the amount of the debts and monies mentioned in the declaration, the plaintiff need not newly assign. *Freeman v. Crafts*, 188.

52. Where the jury found generally that the defendant had paid the plaintiff a larger sum of money than was claimed in the declaration, but found a verdict for the plaintiff, the Court refused a rule to set aside this verdict, and to enter a verdict for the defendant. *Id.*

53. A description of the defendant in the writ and declaration, by the initials of his

christian name, is no ground for setting aside the proceedings; but the proper course is to apply to a judge to amend the declaration, at the plaintiff's costs. *Rusk v. Kennedy*, 468.

PRACTICE.

PROCEEDINGS BEFORE APPEARANCE.

1. It is a sufficient ground for a *distringas*, that at the first time of calling, a written paper, appointing two other days of calling, and accompanied by a verbal appointment of one of the same days, has been left at the house of the defendant, and has been received by him. *Edwards v. Hancorne*, 104.

2. An application to set aside the service of a writ of summons for irregularity must be made within the time limited for appearance. *Child v. Marsh*, 106.

3. Where a copy of a writ of summons stated the action to be "an action on the case promises," the Court set it aside for irregularity. *Youlton v. Hall*, 470.

4. The following indorsement on a writ of summons was held sufficient: "This writ was issued by J. R., No. 10, Gray's Inn Square, Holborn, attorney for the said J. Y." *Youlton v. Hall*, 463.

5. Where a defendant was described in a writ of *capias* as a "gentleman," but the word "gentleman" was omitted in the copy of the *capias*, the Court set aside the writ for irregularity. *Cook v. Vaughan*, 191.

6. A variance between the issue and the writ of trial may be amended at any time. *Farwig v. Cockerton*, 19.

PROCEEDINGS BEFORE VERDICT.

7. In an action for goods sold, and on a promissory note, the defendant, after declaration, paid a certain sum on account of the action, leaving a balance due less than the amount of the note:—*Held*, that the plaintiff could not have a rule to compute, unless the defendant consented to his entering a *note prosequi* as to the count for goods sold. *Jones v. Stiel*, 113.

8. Where two actions were brought by the same plaintiffs against different defendants, on different policies of insurance on the same ship, the Court refused to consolidate them without the consent of the plaintiffs. *McGregor v. Horsfall*, *McGregor v. Smith*, 81.

9. In an action to recover the deposit upon the purchase of an estate, the defendant is entitled to be furnished with particulars of the objections to the title arising from matters of fact, but not those which are matters of law. *Robson v. Rowland*, 105.

10. The plaintiff took issue on a special plea of the defendant, and adding a *similiter* without a date, delivered the issue within the four days of rejoining, the defendant not being bound to rejoin gratis. A motion having been made to set aside the verdict, notice of trial, and subsequent proceedings, on the ground that the *similiter* was not dated, the Court refused the rule. *Seemle*, the want of date to a *similiter* is no ground for setting aside the issue. *Shackell v. Ranger*, 103.

11. The rule requiring a Term's notice, where no step has been taken for four Terms, does not apply to a motion to set aside proceedings. *Lumley v. Hampson*, 113.

12. Amendments may be made in penal as in other actions, unless there has been unnecessary delay. *Jonas v. Edwards*, 44.

13. The omission of the *quo minus*, in a declaration in ejectment, is immaterial. *Doe, d. Blasham v. Roe*, 2.

14. Where time is obtained upon terms of pleading issuably, and rejoining gratis, it only applies to the plea, and not to the subsequent proceedings. *Woodman v. Goble*, 2.

15. The defendant having served the plaintiff with an order for particulars, which were not delivered, afterwards served a demand of declaration upon him, with a notice of abandoning the order, written in the lower corner of it, and then signed judgment of *non pros*. The Court set aside this judgment as irregular, on the ground that the demand of declaration was made before notice of abandoning the order. *Wickens v. Coe*, 201.

16. *Quare*, whether an order once served, can be abandoned, except by means of an instrument equally formal? *Id.*

17. On the 14th January, (the 13th being Sunday,) the defendant pleaded *puis darrien continuance*; judgment recovered on the 5th January: *Seemle*, that the plea was in time. *Dudden v. Triquet*, 469.

18. The rule of *T. T.*, 3 Will. 4, (which requires a plaintiff to declare against a prisoner before the end of the Term next after arrest or detainer) does not apply to the case of a detainer lodged under the 7 Geo. 4, c. 57, s. 55. *Bussard v. Bangsfield*, 336.

19. Where the defendant is bound to accept short notice of trial, and the plaintiff omits to give such notice for the next opportunity of trial, the defendant is afterwards entitled to the regular notice. *Dignam v. Ibbotson*, 130.

20. Where a summons is taken out to stay proceedings on payment of a certain sum and costs, the refusal to accept that sum, will not render the plaintiff liable to the subsequent costs. But if the sum tendered be afterwards paid into Court and accepted by the plaintiff, he will be liable to costs. *Gower v. Binks*, 16.

JUDGMENT AS IN CASE OF NONSUIT.

21. In *assumpsit*, if one defendant let judgment go by default, the other may nevertheless move for judgment as in case of a nonsuit. *Stewart v. Rogers*, 477.

22. The insolvency of defendant, after action brought, is a sufficient answer to a rule for judgment as in case of a nonsuit. *Holland v. Henderson*, 469.

23. When issue was joined in a country cause on the day before *Easter Term*, and no notice of trial had been given:—*Held*, that the defendant might move for judgment as in case of a nonsuit after one Assize had elapsed. But where in such case issue is joined in *Trinity Term*, the motion cannot be made until the following *Easter Term*. *Beans v. Barnard*, 4.

24. Where a cause was ready to be tried, but was withdrawn at the time of trial upon an agreement of reference, which was never signed, and no reference ever took place, the Court refused to give judgment as in case of a nonsuit, on the ground that the plaintiff having taken the cause down for trial once, was not in default, and that the defendant's course was to take down the record by proviso. *Hansby v. Evans*, 420.

PROCEEDINGS AFTER VERDICT.

25. The plaintiff had obtained a verdict against the defendant, in *Trinity Vacation*, 1837, and on the 29th December, in the same year, had proceeded against the bail; on the last day of *Michaelmas Vacation*, 1838, the defendant rendered in discharge of his bail:—*Held*, that not having been charged in execution before the expiration of *Hilary Term*, he was entitled to be discharged out of custody by supersedeas. The 85th rule of *Hil. T.*, 2 Will. 4, does not apply to such a case. *Baxter v. Bailey*, 99.

26. A motion in arrest of judgment, and it seems also for judgment *non obstante veredicto*, must be made within four days of the time of trial, if in Term; if not, within the first four days of the succeeding Term. *Thomas v. Jones*, 204.

27. Where, by an order of *Nisi Prius*, a verdict was taken, subject to the award of an arbitrator, and the time for making the award expired before the order of reference was delivered to the arbitrator:—*Held*, that it was irregular to take the cause down again for trial, without setting aside the previous verdict; and that such irregularity was not waived by the defendant's attorney attending and cross-examining a witness, under an order for the examination of the witness on interrogatories. *Hall v. Rouse*, 245.

PRESUMPTION.

A person who has built on the extremity of his own land, which has been previously excavated, has no right to support from his neighbour's land, unless a grant from the latter may be presumed. And, *semble*, that such grant cannot be presumed until after a lapse of at least twenty years from the time the owner of the adjoining land knew, or had the means of knowing that the land had been so excavated. *Partridge v. Scott*, 31.

PRINCIPAL AND AGENT.

Where an insurance broker, or other mercantile agent, has been employed to receive money for his principal in the general course of his business, and where the known general course of business is for the agent to keep a running account with the principal, and to credit him with sums which he may have received by credits in account with the debtors, with whom he also keeps running accounts, and not merely with monies actually received, and a settlement takes place according to that usage, the original debtor is discharged, and the agent becomes the debtor, according to the meaning and intention, and with the authority of the principal. *Stewart v. Aberdeen*, 284.

PRISONER.

1. The *habeas corpus ad satisfaciendum*, is not *mesne process*, and a prisoner brought up by it to be charged in execution, is not entitled to be discharged under 1 & 2 Vict. c. 110, s. 6. *Reynolds v. Simmonds*, 356.

2. A party, who being arrested on *mesne process* before the 1st October, makes his escape, and is after that day re-taken on an escape warrant, is not entitled to be discharged under 1 & 2 Vict. c. 110. *Nyas v. Milton*, 357.

3. Where a judgment has been obtained against a defendant, and a *ca. sa.* lodged at the sheriff's office, but the day of returning it has not arrived, the defendant is not entitled to his discharge under the 1 & 2 Vict. c. 110, and, therefore, the Court will not order an *exoneretur* to be entered on the bail-piece. *Harrison v. Dickenson*, *Jackson v. Cooper*, 354.

PROBATE DUTY.

See WILL.

A testatrix died, being in possession of foreign bonds, which, at the time of her death, were in the province of *Canterbury*. The bonds were marketable securities within this kingdom, transferable by delivery only, and

no act out of the kingdom was necessary to render their transfer valid:—*Held*, that probate duty was payable in respect of them; and that they were assets to be administered within the province of *Canterbury*. *Attorney General v. Bouwens*, 319.

PROMISSORY NOTE.

To an action on a promissory note, at twelve months' date, the defendant pleaded that one *J. W.*, at the time of his death, was indebted to the plaintiff in a sum of money for goods sold and delivered; and that the plaintiff, after the death of *J. W.*, and before the making of the note, applied to defendant for payment; whereupon, in compliance with the request, the defendant, after the death of *J. W.*, for and in respect of the said debt, and for no other consideration whatever, then made and delivered the note to the plaintiff; that *J. W.* died intestate, and that at the time of the making and delivery of the note no administration had been granted of the estate and effects of *J. W.*, nor was there at that time any person liable for the said debt. *Replication, de injuriâ*:—*Held*, that as the plea did not state that there were no assets, the forbearance to sue during the time the note had to run, was a sufficient consideration, and that the plaintiff was entitled to judgment *non obstante veredicto*. A widow does not become executrix *de son tort* by occupying for three months her late husband's house and shop, if she no way carries on the business. *Serle v. Waterworth*, 281.

PUBLIC COMPANY

1. By a local Act, 4 Will. 4, it was enacted, that actions against the *West Cork Mining Company* might be brought against the persons who should be, for the time being, a managing director, or against any one director for the time being of the said company, as the nominal defendant or party proceeded against on behalf of the said company; and that no action against the company, in the name of such managing director, or director, should abate or be discontinued by the death, resignation, removal or disqualification of such managing director or director. By another local Act, 1 Vict. it was enacted, that it should and might be lawful for any person or persons entitled to take out execution for or in respect of any judgment against a managing director, or any other director as a nominal defendant on behalf of the company, to levy the amount of his damages and costs upon the reserved fund of the company, and all other property whatsoever belonging to the company:—*Held*, that the plaintiff, who had obtained judgment against the defendant as a managing director, was not

entitled to issue execution against him personally. *Harrison v. Timmins*, 410.

2. Where an Act of Parliament creates a company for the execution of certain works, but does not specify any time for their completion, no limitation of time will be presumed, and the works may be completed at any period. *Thicknesse v The Lancaster Canal Company*, 365.

3. A canal company was empowered by Act of Parliament to take lands, &c., "making satisfaction to the owners or proprietors of, or persons interested in the lands," &c., so taken, for any damages by them sustained. By another clause it was enacted, that in the event of the company, owners, or parties interested, not agreeing as to the sum to be paid for the absolute purchase of the land, certain commissioners were to settle what sum was to be paid for the purchase, and also what distinct sum was to be paid as a compensation to "parties interested." The company purchased from Sir R. H. L. land, over which the plaintiff had a railroad, by way of easement. They entered upon the land in December, 1834, but did no injury to the plaintiff's railroad until February, 1836. The plaintiff gave no notice to the company of his having any interest in the land, and nothing was paid to him by the company as compensation. *Held*, that the plaintiff was not entitled to compensation under the Act until he had sustained some actual injury; and that the company were bound to give compensation at any time after the injury. *Held, also*, that the company were entitled to enter upon the land before making compensation. The plaintiff was also tenant to Sir R. H. L., at a rent of 80*l.*, of other land, which he had underlet from year to year, at a rent of 60*l.*; but it did not appear at what times the two tenancies commenced, nor that the plaintiff had any reversion. This land was also sold to the company by Sir R. H. L. The plaintiff made no claim to compensation, nor was any sum awarded to him:—*Held*, that the plaintiff did not shew such an interest as entitled him to compensation. *Id.*

4. *Quare*, whether a tenant from year to year, whose tenancy begins at Michaelmas, and who has underlet from year to year from March, at a higher rent than he pays to his own landlord, is to be considered a reversioner. *Id.*

RECORD.—See AMENDMENT.

REWARD ON CONVICTION.

An advertisement respecting a robbery of bank notes, promised "that whoever would give information by which the same might be traced, should, on conviction of the parties, receive a reward of 20*l.* :—*Held*, that the word

"information," meant the first information; and, therefore, though the plaintiff had given sufficient information, he was not entitled to recover, as it was not given until after other sufficient information had been received. *Lancaster v. Walsh*, 258.

RELEASE.

The defendant purchased a policy of insurance sold by the plaintiff, subject to a condition that the purchaser should pay down a deposit of 20*l.* per cent., sign an agreement for payment of the remainder on the 8th June, 1835, but should the completion of the purchase be delayed, the purchaser was to pay interest on the balance of the purchase money at 5*l.* per cent. per annum, from that day until the purchase was completed. The purchase was not completed until January, 1836, when the defendant paid the purchase money and interest, and the plaintiff then delivered to him an assignment of the policy, containing a release of the defendant from all claim in respect of the purchase of the policy, and all monies due to the plaintiff in respect thereof. It was afterwards discovered that the plaintiff's attorney had miscalculated the interest by 34*l.* :—*Held*, in an action to recover this sum, that the release was a bar. *Harding v. Ambler*, 48.

RIGHT OF WAY.

It is not a proposition of law, that a party who proves his right to use a road for many purposes, is entitled to use it for all purposes; but the extent to which he has used it, is a fact from which the jury may infer a general or a limited right of user. *Cowling v. Higginson*, 269.

SHERIFF.

See ATTACHMENT. PLEADING. WRIT OF TRIAL.

1. The Statute 1 Vict. c. 55, relates to those sheriffs' fees only which are payable on sales by auction; and has not repealed 29 Eliz. c. 4. Consequently sheriffs' fees under the latter Statute remain the same as before the passing of 1 Vict. c. 55. *Davies v. Griffiths*, 339.

2. A debtor being in custody on *mesne process*, the sheriff, after the return of the writ and the expiration of the time for putting in bail, allowed him to be absent from the prison during two mornings, accompanied by the gaoler, to support objections before the revising barrister. The creditor had sustained no damage from the absence of the debtor. *Held, first*, that the sheriff was guilty of a breach of duty; *secondly*, that the creditor,

having sustained no damage in fact or in law, could not maintain an action against the sheriff. *Williams v. Mostyn*, 217.

SLANDER.

A. having contracted to build a house for *B.*, employed *C.*, a carpenter, to do some wood work, for which *A.* had given an estimate. The amount of the bill for this work exceeded the estimate, and *B.* applied to *D.* to recommend him a surveyor, upon which *D.* told *B.* that he had seen *C.* take away some of the quarterings. *B.* informed *A.* of it, who came to *D.*, and asked him if he said so, and *D.* replied, "yes, I saw the man employed by you, take from *B.*'s house two large pieces of quartering; I hallooed to the man."—*Held*, in an action of slander brought by *C.* against *D.*, that this was a privileged communication, and that the plaintiff could not recover unless it appeared that the defendant was actuated by malicious motives. *Kinc v. Sewell*, 83.

SPIRITUAL PERSONS.

The business of a banker is within the meaning of the 57 Geo. 3, c. 99, s. 3, which restrains spiritual persons from trading. *Hall v. Franklin*, 8.

STAMPS.

By agreement in writing three persons undertook in consideration of *A.*'s discharging a debt due from *B.* to *C.*, amounting to 200*l.*, with costs, that each would severally pay 50*l.*, and one fourth part of the costs, and would execute a bill, bond or note, for his own proportion:—*Held*, that one stamp was sufficient. *Ramsbottom v. Davis*, *Ramsbottom v. Gosden*, 464.

STATUTE OF FRAUDS.

1. A contract for the sale of potatoes then planted, at a certain sum per sack, to be dug up at the usual time for digging the same, is not a contract for the sale of an interest in land, within the fourth section of the Statute of Frauds. *Stanbury v. Matthews*, 459.

2. Where there is a joint contract for several articles of different descriptions, an acceptance of any of them is a sufficient part acceptance of the whole to satisfy the 17th section of the Statute of Frauds. The defence that there was no sufficient contract within the Statute of Frauds, may be taken advantage of under the general issue. *Elliott v. Thomas*, 38.

STATUTE.

2 & 3 Edw. 6, c. 13 (Tithes). *Hari Spencer v. Swannell*, 56.

SURETY.

The plaintiffs, who held certain promissory notes as a collateral security, gave by deed further time to the principal debtor, without the consent of the surety; the surety afterwards, and before the notes became due, consented to such giving of time:—*Held*, that the liability of the surety was revived. *Quere*, whether such a deed, executed by one partner only, "for self and partners," can bind the firm, there being no proof of a consent by the others to that mode of execution. *Smith v. Winter*, 384.

TITHES

Debt. To recover a certain sum, due under a tithe composition, from *Michaelmas*, 1835, to *Michaelmas*, 1836. The defendant relied on a notice to quit, given by him to the plaintiff, and which was in the following terms:—"Take notice, that I shall, on and from the 25th day of *March* next, give out and pay in kind all the great and small tithes arising from a certain farm, called *P.*, in the said parish of *L. A.*, which I now occupy. Dated this 10th day of *September*, 1835:" (signed) *W. H.*—*Held*, first, that the same notice to quit was requisite in a yearly tithe composition as in a tenancy from year to year; secondly, that the notice in this case was insufficient, as it did not specify the time of determining the composition. *Goode v. Howells*, 199.

TRESPASS.

1. Trespass will not lie against a party who lays a complaint before a magistrate who has a general jurisdiction over the subject matter, and the magistrate thereupon grants a warrant, under which the party charged is arrested, although the particular case is one in which the magistrate had no authority to act. *West v. Smallwood*, 117.

2. The complainant accompanied the constable who had the execution of the warrant, and pointed out the plaintiff to him:—*Held*, that this was sufficient evidence to go to the jury of a participation in the arrest. *Id.*

3. If a party wrongfully places the goods of another upon his own land, the owner of the goods may enter and retake them. *Fabrick v. Colerick*, 125.

TROVER.

1. *B.*, a builder, undertook for a certain sum to build an hotel for a company, of which the defendants were the trustees, and to do all the work, except the plumbing and ironmongery, which were to be done by the defendants' workmen. It was agreed, that if *B.* became bankrupt, it should be lawful for the defendants to take possession of the work already done, and put an end to the agreement, and that they should pay to *B.* so much money only as should be adjudged to be the value of the work already done and fixed by him. The defendants employed a clerk of the works, whose duty it was to inspect the materials supplied by the bankrupt, and none were used upon the building but such as had been approved by him. Before the hotel was completed, *B.* became a bankrupt. Shortly before the bankruptcy, some deal sash-frames, the subject, among other things, of the present action, were lying at the bankrupt's premises; to these the ironmongers of the defendants had supplied pulleys, and in this state they had been seen and approved by the clerk of the works. After the bankruptcy, the sash-frames were brought to the defendants' premises: the assignees then made a demand of the "sash-frames," and upon the defendants' refusal to deliver them, brought an action of *trover*.—*Held*, first, that this was a contract for the performance of certain work, and not for the sale of goods, and that the sash-frames did not become the property of the defendants until they were fixed to the building. *Held* also, that although the defendants might be entitled to keep the sash-frames for the purpose of covering the pulleys, yet a demand of the sash-frames generally, and a general refusal, were evidence of a conversion. *Tripp v. Armitage*, 442.

2. *Seem*, that the defendants need not have pleaded specially that they kept the sash-frames for the purpose of removing the pulleys. *Id.*

VENUE.

An application to change the *venue* under special circumstances, may be made before issue joined, if the Court can see what the issue will be. *Dowler v. Colles*, 345.

WAGES.

To an action brought to recover the sum of 16*l.* 17*s.* 8*d.*, for seaman's wages, the defendant pleaded that the service of the plaintiff was performed under an agreement made in pursuance of 5 & 6 W. 4, c. 19, whereby the plaintiff agreed that he would serve on board the ship *C.* from the port of London to *C.*, and

back to a port of delivery in the United Kingdom; that afterwards, and before the period for which the plaintiff had agreed to serve was completed, and after the said ship's arrival at her port of delivery, and before her cargo had been discharged, to wit, at the port of *Liverpool*, the plaintiff did wilfully, and without the leave and permission of the defendant or the master, or other person in command, absolutely desert the said ship, whereby, and according to the said Statute, he, the said plaintiff, forfeited to the defendant, the owner of the said ship, his said wages or salary. The replication traversed the absolute desertion. The question being, whether the entire wages, or only a month's wages, were forfeited.—*Held*, that that question was on the record. *Held* also, that a seaman who, after the arrival of a ship at her port of discharge, but before her discharge, quits her, and does not return, does not forfeit all, but only a month's wages. *M'Donald v. Jephling*, 271.

WARRANT.

1. An order under 11 G. 2, c. 19, s. 14, which states that witnesses were examined by the magistrates upon oath, is not bad because it omits to allege that the witnesses were examined upon oath as to the value of the goods removed. *Coster v. Wilson*, 141.

2. A warrant of commitment is not invalid for omitting to state that complaints were made in writing, and that the witnesses were examined upon oath, if statements to that effect are contained in the order, and the order is incorporated in the warrant. *Id.*

3. Magistrates are empowered by 11 G. 2, c. 19, to determine whether goods have been removed *fraudulently*, even in cases where there are conflicting titles to the premises. *Id.*

WARRANTY.

The father of the plaintiff purchased a gun at the shop of the defendant, and stated at the time that he purchased it for the use of himself and his sons. The defendant warranted, and represented that the gun was made by *N.*, and was a good, safe and secure gun. The plaintiff used the gun, which exploded and shattered his arm.—*Held*, that the action was maintainable, on the ground of fraud. *Levi v. Langridge*, 325.

WAY.

Where the plaintiff declares in trespass against the defendant for breaking and entering his close with horses and carriages, and the defendant pleads a general right of way over the close for horses and carriages, the

plaintiff may shew, without a new assignment, that the defendant is not entitled to convey "coals" along the close in question. *Couling v. Higginson*, 269.

WILL.

See PROBATE DUTY.

1. A testator being possessed of two houses and gardens, devised them to trustees in the following terms:—"Upon trust that they, the said *D. D.* and *J. M.*, do and shall pay and apply the rents, issues and profits thereof unto my wife, *M. J.*, yearly, during so long a time as she shall remain a widow; and from and after the determination of that estate to the use and behoof of all and every of my child or children by my said wife, *M. J.*, equally to be divided between them, share and share alike, and the lawful issue of their, or her, or his bodies or body for ever; and for default of such issue, to the use and behoof of my nephew *D. J.*, his heirs and assigns for ever. I give, devise and bequeath unto my daughter *F. J.* the sum of 300*l.*, to be paid her when she attains the age of twenty-one years, and the house where she now lives, after the decease of her mother, or the day of her intermarriage. Also I give, devise and bequeath unto my daughter *R. J.* the sum of 300*l.*, when she attains the age of twenty-one years, and the house now in the occupation of *D. D.*, after the decease of her mother, or the day of her intermarriage." The two houses separately devised to the two daughters were the same as those mentioned in the former part of the will. The testator, at the time of his death, left no other children than the two daughters mentioned in his will, and they, after the death of their mother, *M. J.*, entered into the separate possession of the two houses. *F. J.*, one of the daughters, afterwards died, and the defendant, her husband, continued in possession of the dwelling-house in her occupation. An ejectment having been brought by the other daughter to recover an undivided moiety of this house:—*Held*, that the two daughters took an estate for life in each house, with remainder to them as tenants in common in tail; and, therefore, that the plaintiff was entitled to recover. *Doe*, dem. *Amlot v. Davies*, 439.

2. Testator gave and devised to his wife, his daughter, and her husband, and their heirs, certain real estates, to hold to them, and the survivors and survivor of them, and the heirs of the survivor, on trust, to permit his wife to receive the *net rents* during her life, without prejudice to a rent-charge to his daughter, under her marriage settlement; and after the decease of his wife, upon further trust, &c.:—*Held*, that the legal estate vested in the trustees. *Barker v. Greenwood*, 389.

3. The testatrix, after devising her real

estate to *S. K.*, and then to *J. K.*, for life, if he survived her, gave and devised the same unto "their second son, and the heirs and assigns of such second son for ever." At the time of making the will they had had three sons, but only one was living, which circumstance the testatrix was aware of. Afterwards, and before the death of the testatrix, a fourth son was born, and died, and there was a fifth son born, who survived the testatrix:—*Held*, that after the death of *S. K.* and *J. K.*, the fifth son was entitled to take under the terms of the devise. *King v. Bennett*, 289.

4. Testator devised his freehold, copyhold and leasehold estates to his wife for life, and from and after her decease, to his son and daughters, "and their lawful issue respectively in tail general, with benefit of survivorship to and amongst the issue respectively, as tenants in common, and not as joint tenants":—*Held*, that by the word "issue," the testator must be taken to have meant "children," and that his children took life estates, as tenants in common, in the freehold and copyhold lands, with contingent remainders to their children by purchase, as tenants in common in tail, with cross remainders over; and that the children and grand-children took corresponding interests in the leasehold, by way of executory bequest. *Cursham v. Newland*, 296.

5. Devise of real estates to *A.* and *B.*, "equally between them, to take as joint tenants, and their several and respective heirs and assigns for ever":—*Held*, that the devisees took an estate for life as joint tenants, with remainder to each of them, as tenants in common in fee, after the death of the survivor. *Doe*, dem. *Littlewood v. Green*, 314.

6. A married woman, by her marriage settlement, had power to appoint certain land to uses by her last will and testament, "signed and published in the presence of, and attested by three witnesses." She devised all her property, real and personal, but did not refer to the power. The attestation stated the will to be signed, sealed and delivered by the testatrix in the presence of three subscribing witnesses:—*Held*, that delivery is equivalent to publication of a will, and that this was a due execution of the power. *Curteis v. Kenrick*, 120.

WITNESS.

1. An objection to the competency of a witness must be taken on the *voir dire*. *Dewdney v. Palmer*, 462.

2. The declaration stated, that whereas in a certain action of ejectment, such proceedings were held, that afterwards, on the 31st March, 1838, before certain justices of Assize and *Nisi Prius*, at *Taunton*, in the county of *Somerset*, a certain issue, before them joined in the said plea, came on to be tried. And whereas before

the trial of the said issue, to wit, on the 21st *March*, the plaintiffs sued out a subpoena, directed to the defendant, commanding him to appear before the justices assigned to hold the Assizes in and for the county of *Somerset*, at *Taunton*, in the said county, on *Saturday*, the 31st *March* then instant, and so from day to day till that cause should be tried, to testify, &c., in the said action then depending, and to produce certain documents on the trial of the said issue, and that although the defendant might have appeared at the trial of the said issue, and might have produced the said documents at the time and place aforesaid, on the said trial of the said issue, yet the defendant would not, at the time and place aforesaid, on the trial of the said issue, at the time and place aforesaid, produce the said documents. The replication stated, that the trial of the said issue, in the said declaration mentioned, took place on the 6th day of *April*, 1838, and that the defendant could have appeared at the said trial of the said issue:—*Held*, first, that it sufficiently appeared, on general demurrer, that the trial referred to in the subpoena took place at the Assizes mentioned in the declaration. *Secondly*, that an averment that "the appearance of the defendant was material and necessary at the trial," was equivalent to an averment that the plaintiffs had a good cause of action. *Thirdly*, that an action will lie for disobedience to a subpoena served after the first day of the Assizes, and commanding the witness to attend on that day, and so from day to day until the cause is tried, provided the trial takes place within a reasonable time after service of the subpoena. *Fourthly*, that it is not necessary to aver that the absence of the defendant, as a witness, was the sole cause of the

plaintiffs failing in their action. That that fact is important only with regard to the amount of damages to be recovered in an action against such witness. *Fifthly*, that an averment, that the defendant would not appear or produce certain documents at the time and place of trial, although he was then and there solemnly called upon for that purpose, is sufficient on general demurrer. *Davis v. Lovell*, 451.

WRIT OF TRIAL.

1. The first count of the declaration stated, that in consideration that the plaintiff would buy of the defendant a certain horse for 7*l*. 2*s*. 6*d*., the defendant promised that he was a quiet worker, and would go well in spare harness: *Breach*, that the horse was not a quiet worker, and that the plaintiff was put to expence in keeping it. There were also counts for money had and received, and on an account stated:—*Held*, that this was a case triable before the sheriff, under the Writ of Trial Act. *Allen v. Pink*, 207.

2. A writ of trial was directed to the Sheriff's Court in *London*. The writ was returnable on the 19th *January*; a Court was holden on the 18th, and adjourned until the 20th, on which day the cause was tried. *Mortimer v. Preedy*, 157.

3. *Semble*, that the judge had no jurisdiction to try the cause after the writ was returnable. *Id*.

4. *Quare*, as to whether debt for use and occupation, by the assignee of the reversion against the lessee, is local. *Id*.



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Exchequer
WALLER
t
SMITH.

similar discretion. In this case, it would be unjust to deprive the attorney of his costs, as it is the first time the question has occurred with respect to an award. The Master must use his discretion, and not consider himself bound to tax on the lower scale.

ALDERSON, B.—The directions to taxing officers apply only to the taxation of costs, as between party and party. But still the attorney should be careful not to incur more costs than are likely to be allowed to his client, and, at all events, he ought to see that the barrister to whom the cause is referred has power to certify for the higher scale of taxation. Still, an attorney must not be placed in the situation of conducting a cause at his own peril. The Master must exercise his discretion in this case; and as it is the first instance of the kind, he may use a more liberal discretion now than in future.

GURNEY, B., and MAULE, B., concurred.

Rule granted.

PARKE, B., afterwards said that the rule *nisi* must be served on the assignees of the plaintiff; and that on their not appearing to shew cause against it, it would be absolute, as of course. The assignees not having appeared to shew cause, the rule was afterwards made

Absolute.

WARD v. PEARSON.

The declaration stated that the defendant agreed to erect a booth or building, and fit up the same before the 28th June, according to certain plans agreed on between him and the plaintiff, for the sum of 20*l*. This contract not having been proved at the trial, the judge amended the record by substituting the following contract in lieu of the one declared upon:—“The defendant agreed to erect seats and tables for 25*l*. Held, on motion for a new trial on the ground of the amendment being improper, that the amendment was right.

ASSUMPSIT on a special contract. The declaration stated, that the plaintiff was a licensed victualler, and the defendant was a carpenter and builder; and that in consideration, &c., the defendant promised the plaintiff that he would, before the 28th of June (the day of the coronation), erect a booth, or building, and fit up the same according to certain plans agreed upon between them, for the sum of 20*l*. *Breach*, that the defendant did not so erect, &c., according to certain plans. *Pleas*: *first, non-assumpsit*; *second*, that the contract was afterwards rescinded by the parties. At the trial, before Lord Abinger, C. B., at the London Sittings, after Hilary Term, 1839, the contract proved was, that the defendant should erect seats and tables, for 25*l*., five days before the 28th June. The defendant's counsel contended, that the contract declared upon had not been proved, and that the plaintiff ought to be nonsuited. The learned judge refused to nonsuit, and ordered the record to be amended by substituting the words, “erect seats and tables for 25*l*.” in lieu of the words “erect a booth or building, according to certain plans, for the sum of 20*l*.” The jury found a verdict for the plaintiff, damages 5*l*.

Platt now moved for a new trial, under the 23d section of the Stat. 3 & 4 Will. 4, s. 42, on the ground that the amendment was improper. The contract proved differs entirely from that declared upon. If a party may allege

a contract to erect a booth, on certain plans, for 20*l.*, and prove a contract to erect seats and tables, without plans, for 25*l.*, a laxity of statement will be introduced that may prove extremely prejudicial to defendants. The contract proved differs as much from that declared upon, as an agreement to build a house varies from an agreement to erect a steam-engine.

Eschequer.
WARD
v.
PEARSON.

LORD ABINGER, C. B.—When this question was discussed before me, at the trial, I felt much reluctance to amend the record, because I considered the two contracts to be substantially different in character. But upon further consideration, I think I was right in making the amendment.

PARKE, B.—I think the present case comes within the scope of the Act of Parliament. The amendment was made in a matter that “was not material to the merits of the case.” I quite approve of the course taken by the Lord Chief Baron, and think this rule ought to be refused.

ALDERSON, B.—The first question in this case was, whether there was a contract or not. The second was, whether it was rescinded, not whether it contained particular expressions. If a plaintiff could be turned round at the trial, on the grounds suggested by the defendant’s counsel, the object of the Act of Parliament would be defeated. The parties, in fact, came to try whether there was a contract or not. A contract was proved; and although it varied in some respects from the one declared upon, yet the variance was not as to a matter material to the merits of the case.

MAULE, B.—In all cases of contracts not reduced to writing, there must be some uncertainty as to what will be proved at the trial. The mischief arising from this circumstance was intended to be remedied by the Act of Parliament. I think there was just ground for amendment.

Rule refused.

HALLETT v. HALLETT.

THIS was a rule calling upon the defendant to shew cause why the award made in his favour should not be set aside on the ground of its having been made after the arbitrator’s authority had expired. The reference took place under a judge’s order, which gave the arbitrator power, by indorsement on the order, of enlarging the time for making his award. The arbitrator being anxious to enlarge the time, applied to the plaintiff’s attorney for a form of enlargement, and, in pursuance of directions received from him, wrote the following words on the back of the order:—“I direct that a rule of this Court shall be applied for to enable me to enlarge the time for making my award.—*J. S.*” No rule of Court, for the purpose of enlargement, was ever applied for, and the parties proceeded with the reference without taking any objection to the want of it.

An arbitrator who had power to enlarge the time of making his award, by indorsement on the order of reference, applied to the plaintiff’s attorney, and received from him a form of enlargement. In pursuance of this, he wrote on the back of the order, “I direct

that a rule of this Court shall be applied for, to enable me to enlarge the time for making my award.” No rule of Court in pursuance of this direction was applied for, and all the parties proceeded with the reference.

The Court held the enlargement sufficient, and refused to set aside the award.

Eschequer.

 HALLETT
 v.
 HALLETT.

Barstow shewed cause.—The arbitrator appears to have thought that a rule of Court was necessary, to enable him to enlarge the time for making his award. He therefore gives a direction that such rule shall be applied for, but the direction was superfluous, and the non-compliance with it will not vitiate the award, especially when the plaintiff's attorney during the reference made no objection to the supposed irregularity. He cited *Halden v. Glasscock (a)*. He was then stopped by the Court.

Archbold, contrd.—The arbitrator directs that the enlargement shall take place in a certain mode, and his direction has not been complied with. It would have been sufficient if a rule of Court had been obtained before making the award. The meaning of the arbitrator is that he will consent to an enlargement if it is made by a rule of Court. *Halden v. Glasscock*, is an authority in favour of the plaintiff. The present application is made by the plaintiff, who was not a party to the act of his attorney in giving the form of enlargement. The attorney acted merely as a friend of the arbitrator.

PARKE, B.—This rule must be discharged with costs. I think this enlargement of the time is sufficient. The arbitrator by his indorsement meant to say that it was fit that an enlargement should be made. Besides, the attorney for the plaintiff goes on with the reference, without making any objection to the want of a sufficient enlargement. There is evidence of a parol submission.

ALDERSON, B.—I am inclined to think that this enlargement is good. The arbitrator enlarges the time, and requests the Court to concur in his act. But the concurrence of the Court is not necessary. This rule must be discharged.

GURNEY and MAULE, Bs. concurred.

Rule discharged with costs.

In answer to an application that the plaintiff's attorney should be compelled to pay the costs, the Court said they would not make such an order, for the attorney was not a party to the rule, but that in all probability he would see the propriety of paying the plaintiff's costs

(a) 8 D. & Ry. 151; 5 B. & Cres. 390.

BORTHWICK v. RAVENSCROFT.

An affidavit, in support of a rule to set aside a *distringas*, must follow the description of the

A RULE had been obtained, calling upon the plaintiff to shew cause why a *distringas*, issued in this case, should not be set aside, on the ground of its having been moved for four months subsequently to the date of the writ of summons.

the cause, as stated in the writ of summons.

Hunfrey shewed cause, and objected that the defendant's affidavits were improperly entitled. The action was commenced by "*John Borthwick*, against *Henry Ravenscroft*;" whereas the defendant's affidavits were entitled "*John Borthwick*, plaintiff, and *Humphry William Ravenscroft*, sued as *Henry Ravenscroft*, defendant."

Exchequer
BORTHWICK
v.
RAVENS-CROFT.

Gray, contra, contended, that the defendant, having been sued in his wrong name, was entitled to give his proper name in his affidavit, and that, at all events, the Court would allow him to amend.

Per Curiam — This affidavit is entitled "*John Borthwick*, and *Humphry William Ravenscroft*, sued as *Henry Ravenscroft*." There is no such cause before the Court. There is a cause in which "*Henry Ravenscroft*" is the defendant, and although the real party sued does not bear the name of "*Henry*," still the cause must remain in that state until the defendant has appeared. The rule, must, therefore, be discharged, on the ground of the affidavits being wrongly entitled, but without costs.

Rule discharged, without costs.

SUGARS v. CONCANEN.

THE defendant was arrested by a judge's order, under the 3d section of the Imprisonment for Debt Act, 1 & 2 Vict. c. 110, and gave a bail-bond. The third section enacts, "That the sheriff or other officer to whom any such writ of *capias* shall be directed, shall, within one calendar month after the date thereof, including the day of such date, but not afterwards, proceed to arrest the defendant thereupon." The defendant was arrested within the month; but the copy of the *capias* served upon him, stated that the writ was to continue in force *four* months from its date.

On shewing cause against a rule, the Court will not take judicial notice of a judge's order if it is not verified by affidavit, or the rule is not drawn up on reading it.

A rule *nisi* was obtained, calling upon the plaintiff to show cause why the bail-bond should not be delivered up to be cancelled. The arrest was made on the 28th *March*, and the present rule was not obtained till the 17th *April*. It appeared also, that, by an order of *Coltman, J.*, made at chambers, an application to cancel the bail-bond had been made shortly after the arrest, but the order of the judge was not verified by affidavit, nor was the rule drawn up on reading it.

Quare, whether an arrest, under ss. 3 & 4 of Stat. 1 & 2 Vict. c. 110, is irregular, where the copy of the *capias* states that the writ is to be in force for four months instead of one

W. H. Watson, now shewed cause, and contended, that the application to set aside the bail-bond, on the ground of irregularity, was made too late. That the judge's order could not be used, as the present rule was not drawn up on reading it, nor was it verified by affidavit. He cited *Brashour v. Russell (a)*.

J. W. Smith, contra, insisted that the Court would take judicial notice of

(a) 4 Bing. N. C. 31; 3 Hodges, 242; see also *Daly v. Mahon*, ib. 8; 3 Hodges, 261.

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the order, since all the judges had a concurrent jurisdiction in matters of practice arising in the superior Courts.

Per Curiam.—The application to deliver up this bail-bond is made too late, and must be discharged, with costs. We cannot take notice of the order of Mr. Justice *Coltman*, as it is not verified by affidavit; and the present rule is not drawn up on reading it. If the defendant intended to rely upon the order, he should have notified to the other side his intention of using it, and then they might have been prepared to answer it. The defendant, not having taken that step, the other side may think he does not intend to rely upon it.

Rule discharged, with costs

BROWN and another v. FLEETWOOD.

The plaintiffs covenanted with the defendant to buy of him a certain business, paying 200*l.*, in the first instance, and a further sum at a future period. The plaintiffs were to be at liberty, at the end of a year and a half, to abandon the purchase; in which case, the defendant was to re-pay them 50*l.*, part of the money advanced. The defendant was afterwards discharged, under the Insolvent Act, upon which the plaintiffs, within the time specified, abandoned the purchase, and brought an action to recover the 50*l.*

Held, that this was not such a debt as could be ascertained at the time of the insolvency, and, therefore, that the defendant was not discharged from it.

COVENANT. The declaration stated, that the plaintiffs covenanted, by indenture, to buy of the defendant his business of an attorney, and, in consideration thereof, to pay him the sum of 200*l.*, in the first instance, and the further sum of 200*l.* within a certain period. That it should be lawful for the plaintiffs, at the end of a year and a half, to complete the purchase, or, on giving notice of their intention to the defendant, to vacate the deed and abandon the purchase. That in the event of their abandoning the purchase, the defendant covenanted to re-pay them the sum of 50*l.*, paid by them to the defendant in the first instance.

Breach, that although the defendant had notice of the intention of the plaintiffs to abandon the purchase, yet that he had refused to re-pay the sum of 50*l.*

Plea: discharge under the Insolvent Debtors' Act.

At the trial, before *Patteson, J.*, at the *Stafford Summer Assizes*, it appeared, that the indenture in question was dated the 29th *March*, 1837. That the defendant was discharged under the Insolvent Debtors' Act, in *August*, 1838; and that, in the *September* of that year, the plaintiffs gave the defendant notice of their intention to abandon the purchase. The jury found a verdict for the plaintiffs, with 50*l.* damages; and the defendant had leave to enter a verdict for him, if the Court should be of opinion that the debt was barred by his discharge under the Insolvent Act.

Whalesley now moved accordingly.—The defendant is discharged from this debt by the operation of the 51st section of the Insolvent Act, 7 *Geo. 4*, c. 57, which enacts, that a prisoner's discharge shall extend "to any sum or sums of money which shall be payable by way of annuity or otherwise, at any future time or times, by virtue of any bond, covenant, or other securities, of any nature or kind whatsoever." The sum in question was a sum payable "by way of annuity or otherwise," as it was paid at the option of the plaintiffs, and was a contingency capable of being calculated. In *Ex parte Tindal (a)*, a party had covenanted to cause 4000*l.* to be paid to his

(a) 8 Bing. 402; 1 M. & Scott, 607; 1 Mont. & Mac. 415; 1 Dea. & Chit. 291.

wife's trustees, within twelve months after his death, in trust to pay the interest to his wife, if she married him, and afterwards, the principal to their children, and in default of children, to the survivor of them, his or her executors or administrators. This was considered a debt, payable on a contingency.—[*Parke, B.*—That case was decided under the Bankrupt Act, which contains a provision that debts, payable on contingencies, may be valued by the commissioners (*b*). There is no such clause in the Insolvent Act.]—He cited the case of *Lawrence v. Walker (c)*.

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LORD ABINGER, C. B.—There is no ground for a rule in this case. The debt in question is payable on a contingency which does not admit of any calculation.

PARKER, B.—The defendant is not discharged by virtue of the Insolvent Act, as the debt in question was not capable of being valued at the time of the insolvency. There is a difference, in this respect, between bankruptcy and insolvency, as, in the former case, the commissioners are authorized by the 56th section to set a value upon contingent debts.

ALDERSON, B.—The present debt was not susceptible of valuation, as it was impossible to say whether the plaintiff would be willing or not to abandon his purchase, and give up the business.

AULE, B., concurred

Rule refused.

(*b*) The 56th section of 6 *Geo. 4, c. 16*, is to the following effect:—

“And be it enacted, That if any bankrupt shall, before the issuing of the commission, have contracted any debt payable upon a contingency which shall not have happened before the issuing of such commission, the person with whom such debt has been contracted may, if he thinks fit, apply to the commissioners to set a value upon such debt; and the commissioners are hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and

to receive dividends thereon; or if such value shall not be so ascertained before the contingency shall have happened, then such person may, after such contingency shall have happened, prove, in respect of such debt, and receive dividend with the other creditors, not disturbing any former dividends: Provided such person had not, when such debt was contracted, notice of any act of bankruptcy by such bankrupt committed.”

(*c*) 3 *Dowl.* 614; 1 *Har. & Woll.* 205.

DEARDEN v. EVANS.

TROVER for stones. *Plea*: Not Guilty. At the trial, before *Alderson, B.*, at the *Liverpool Summer Assizes, 1838*, the following facts appeared in evidence. The plaintiff was the lord of the manor, and the defendant was his tenant; and the action was brought against the tenant for removing from

Stones which have lain for a long period upon land, and which are lying upon it when it is demised to a

tenant, *prima facie* belong to the owner of the land, and the tenant is not entitled to remove them.

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the copyhold certain stones, varying in weight from one to twenty tons. Adjoining the defendant's copyhold were some cliffs called *Redishore Scouts*, belonging to the plaintiff's manor; and there were also other cliffs adjoining, which belonged to a third party. It was proved, that about thirty years ago a large quantity of stones, similar in size to those removed, had fallen from *Redishore Cliffs* upon the land now occupied by the defendant, but no other proof was given that the stones removed formed part of that quantity. There was no evidence that the stones in question had rolled down upon the copyhold subsequently to the defendant's tenancy. Some were entirely covered with the soil, others were partially embedded by their own weight, and others lay upon the surface. The value of the soil was increased by the removal of the stones; but the defendant had no other motive in removing them than to sell them to the proprietors of an adjoining railway. *Alderson, B.*, told the jury that the stones in question *prima facie* formed part of the lord's manor, and that the copyhold tenant had not shewn any right to remove them; and he directed the jury to find a verdict for the plaintiff for nominal damages. The jury found a verdict for the plaintiff, with 1*s.* damages.

Wightman now moved for a new trial, on the ground of misdirection.—A copyhold tenant is entitled, for the improvement of agriculture, to remove stones that encumber the soil; and if he has a right to remove them, he may also sell them. They do not form part of the soil, nor can they be said to be attached to the freehold. If we suppose the stones in question to have rolled from the cliffs thirty years ago, the present lord cannot have acquired any title to them. At that time they were loose chattels.—[*Lord Abinger, C. B.*—Can you contend that loose soil, washed down by a river upon the soil or a proprietor, can be taken away by his tenant?—That case is not analogous to the present; because, the earth so brought down cannot be separated from the original soil. It may be conceded, that it would be waste for a copyholder to open a new stone quarry, *Peachy v. The Duke of Somerset* (a); but the case is different where a tenant removes loose individual stones that encumber his close, and obstruct the improvement of agriculture.

LORD ABINGER, C. B.—I should be unwilling to refuse a rule, in the present case, if it were necessary to decide whether a copyholder may carry away stones which have been recently cast upon his land by some accident of nature, and which obstruct the cultivation of the soil. Perhaps a tenant from year to year would have such a right, if he could not otherwise enjoy his land. But it is a very different question, whether stones, of from one to twenty tons in weight, which may perhaps have been embedded in the soil since the Deluge, are to be considered as encumbrances. A landlord, in such case, may have a right to enter upon the land, and carry away such stones for his own use; but I think that a tenant can have no such right, under the circumstances of the present case. The tenant does not remove them with a view to improve the value of the estate, but for his own profit. The stones form part of the land, and add to its value; and to take them away is the same as taking away part of the land itself.

PARKE, B.—There is no ground for a rule. The point made by Mr. *Wightman* does not arise, because it may be conceded, that if the stones had fallen upon the land, occupied by the defendant, by the act of God, or by some convulsion of nature, during the defendant's tenancy, the lord of the manor would have had no right to them. They would belong either to the tenant, or to the owner of the cliffs from which they might happen to fall. Here, however, the stones have been upon the land for a very long period; and I think they formed part of the lord's land, as much as if they had been soil and gravel brought down by rivers, and deposited upon his land. The case would have been different if the tenant had proved a custom for him to take them away. I think, therefore, that as these stones did not fall upon the land during the tenancy of this copyholder, they formed part of the soil demised by the lord, and that the direction of my brother *Alderson* was correct.

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ALDERSON, B.—The evidence shewed that a quantity of stones had fallen upon the tenant's land thirty years ago; and it was clear that the stones in question were lying upon the soil when the defendant took the copyhold. That circumstance seemed to me to make an end of the case. I thought that, *primâ facie*, the stones formed part of the soil, and that if the tenant claimed a right to remove them, he ought to shew it.

Rule refused.

PITCHFORD and another v. DAVIS.

ASSUMPSIT for goods sold, work and labour, and on an account stated.

Plea: non assumpsit. At the trial, before Lord *Abinger*, C. B., at the London Sittings after *Hilary Term*, 1839, the following facts appeared in evidence:—In 1836, certain persons formed themselves into a Company, by the name of "The United Kingdom Beet-root Sugar Association," and issued a prospectus, in which they stated that their capital was to be 250,000*l.*, in 10,000 shares of 25*l.* each, with a deposit of 2*l.* per share. The defendant applied for and obtained 50 shares, upon which he paid the deposit of 2*l.*, and subsequently, in answer to a call by the Company, paid the sum of 3*l.* per share. In the summer of 1836, the Company, with the knowledge of the defendant, began to erect their works, and towards the end of *December*, the secretary, without the knowledge of the defendant, sent to the plaintiffs a written order for a quantity of alum and charcoal, the subject of the present action. The defendant had been at the Company's office, and had witnessed the manufacture of the sugar, but did not appear to have taken an active part in the works. Subsequently to the delivery of the goods, he offered his shares for sale. It appeared further, that of the 10,000 shares proposed, no more than 1,400 were disposed of when the goods in question were ordered.

The defendant became a shareholder in a company established for the manufacture of beet-root-sugar. The capital was to consist of 250,000*l.*, divided into 10,000 shares of 25*l.* each, but no more than 1,400 shares were ever disposed of. The defendant was not aware that the whole number of the shares had not been sold. An action having been brought against him for the price of certain goods

ordered without his knowledge by the secretary of the Company, for the use of the Company:—*Held*, that the defendant, who had not held himself out to the world as a partner, could be charged only on the ground of having authorized the directors to pledge his credit for the goods: that he could not be presumed to have done so in this case, unless the whole proposed capital had been raised; or unless, with a knowledge of its not having been raised, he had authorized the directors to proceed with the speculation.

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It was objected at the trial, that, under these circumstances, the defendant was not liable. Lord *Abinger*, C. B., told the jury that this was not the case of a party holding himself out to the world as a partner. That the defendant subscribed to the Company on the understanding that 10,000 shares were to be disposed of. That the Company had no authority to incur expences until that number of shares was sold; and that the defendant could only be liable, if, with a knowledge that that amount of shares had not been disposed of, he had authorized the directors to proceed. The jury found a verdict for the defendant.

Erie now moved for a new trial, on the ground of misdirection.—The defendant was a partner in this Company, and, therefore, liable for the goods supplied. *Vice v. Lady Anson* (a), *Dickinson v. Valpy* (b), *Bourne v. Freeth* (c), were cases of Mining Companies, and, therefore, do not apply to this Company, which is established for trading purposes. If it be law that the credit of the shareholders cannot be pledged for goods supplied to the Company, as long as a single share remains undisposed of, it will follow that shareholders will not be liable to tradesmen who supply goods, unless every farthing of the sum proposed is first raised.

Lord *ABINGER*, C. B.—The extreme case, put by Mr. *Erie*, may be answered by another of the same kind. Would the directors of a Company, with a proposed capital of a million pounds, as soon as they had disposed of a single share, be justified in incurring expences, and throwing the responsibility upon the single shareholder? If they wish to begin their works before their entire capital is raised, they ought to call the shareholders together, and obtain their authority to proceed. I think the proper question for the jury, in this case, was, whether the directors were the agents of the defendant for the purpose of beginning business with so small a capital. We cannot grant a rule.

PARKE, B.—The defendant did not give the directors an unqualified authority to pledge his credit for goods. His agreement is, that if they raise the sum of 250,000*l.*, he will become a partner, and will be answerable for their engagements. This is a conditional contract, and the condition has not been fulfilled. It makes no difference that the Company was established for trading purposes. The directors had no original authority to bind the defendant; and he has not subsequently ratified their acts.

ALDERSON, B.—I think the jury formed a right conclusion. The defendant gave the directors of the Company a qualified authority merely, and they have thought proper to exceed it.

Rule refused.

(a) 7 B. & Cr. 409; 1 Man. & R. 113.

(b) 10 B. & Cr. 128; 5 Man. & R. 26.

(c) 9 B. & C. 632; 4 Man. & R. 512.

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ASSUMPSIT on a bill of exchange, by the indorsee against the drawer.

Plea: that the bill of exchange was drawn, accepted and indorsed in payment of the price of seventeen pockets of hops, before then sold by the plaintiff to the defendant, as and for hops of a certain planter, to wit, one *J. Hilder*, and answering certain samples then produced and shewn by the plaintiff to the defendant, and to be, within a reasonable time after the said drawing, acceptance and indorsement of the said bill, delivered to the defendant. That although a reasonable time for the delivery of the said hops had, at the commencement of the suit, elapsed, yet the defendant had not yet delivered any pockets of hops answering the said samples, or either of them, or any hops whatsoever; and the said hops, so sold to the defendant as aforesaid, remained, and were wholly undelivered, and the consideration on which the said bill was drawn, accepted and indorsed had wholly failed. That save as aforesaid, there was no value or consideration whatsoever for the drawing, acceptance or indorsement of the said bill.

Replication, de injuriâ

At the trial, before *Erskine, J.*, at the *Worcestershire Summer Assizes*, 1838, it was proved, that seventeen pockets of hops were delivered to the defendant, and were still lying at his warehouse, but they did not correspond with the samples previously shewn to the defendant. Upon this evidence, the learned judge was at first of opinion that the averment in the plea, that no hops were delivered, was material, and had been disproved. He then left the case to the jury, but ultimately directed them, that, if they thought there had been no delivery of hops corresponding with the sample, the defendant was entitled to the verdict. The jury found that the hops did not correspond with the sample, and they found a verdict for the defendant. The learned judge gave the plaintiff leave to move to enter a verdict for the principal and interest due on the bill of exchange, if the Court should be of opinion that the plea had not been proved.

Ludlow, Serjt., now moved accordingly.—The delivery of seventeen pockets of hops having been proved at the trial, there has been nothing more than a partial failure of consideration; and that circumstance affords no defence to an action on a bill of exchange. To constitute a good defence, there must be either fraud, or a total failure of consideration, *Morgan v. Richardson (a)*. Here, the issue was whether any hops had been delivered to the defendant. The plaintiff has been prejudiced by the course pursued by the defendant; for if the delivery had not been denied by the plea, the plaintiff might have averred it in his replication, and have stated that certain hops, which had been delivered, had been retained by the defendant.

To an action against the drawer of a bill of exchange, the defendant pleaded that the bill was drawn, indorsed and accepted in payment of seventeen pockets of hops, sold by the plaintiff to the defendant as answering certain samples: that the defendant had not delivered any pockets of hops answering the said samples, or any hops whatsoever, whereby the consideration for the bill had wholly failed. *Replication, de injuriâ*. It appeared that the plaintiff had delivered to the defendant seventeen pockets of hops, but they did not correspond with the samples. The jury found a verdict for the defendant. On a motion to enter a verdict for the plaintiff, the Court refused a rule, on the ground that the averment that no hops had been delivered was an immaterial averment, and that there was a total failure of consideration for the bill.

PARKE, B.—We cannot grant a rule in the present case. Every material allegation in the plea was proved, and the averment that no hops whatsoever

(a) 1 Campb. 40, note.

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were delivered, was altogether immaterial. The proper course, in a case like the present, is to ascertain what facts are material, and to reject those which are immaterial. Here was a sale of hops to the defendant, and he avers, that although a reasonable time for the delivery of the hops had elapsed, yet he plaintiff had not delivered any pockets of hops answering the said samples, or any hops whatsoever. That is a good plea; for as the hops were to correspond with the sample, and were not delivered in reasonable time, and did not correspond with the sample, the plea shews a failure of consideration *in toto*. The situation of the parties would have been different, if the defendant had accepted them, as in that case there would have been a new contract. My only doubt was, whether this form of plea had not placed the plaintiff in a difficulty with regard to his replication. But I think that is not the case, as he could not answer the plea, unless he shewed a delivery of other hops corresponding with the sample, or could aver the acceptance of other hops, as a performance of the original contract. Now, it is clear, that in this case the hops were not accepted as a performance of the original agreement. I think, therefore, that the material part of the plea was proved.

ALDERSON, B.—The allegation of the defendant, which was not proved, is immaterial. There was a total failure of consideration, as the goods delivered did not correspond with the sample. If, indeed, they had been accepted by the defendant, then their agreement with the sample would have been immaterial. The evidence, however, negatives that fact; this rule, therefore, must be refused.

GURNEY, B. concurred

Rule refused.

CROXON v. WORTHEN.

A maker of a note, payable at a particular place, promised, after it had been dishonoured, to pay it by instalments:—*Held*, that under an issue denying the presentment at the particular place, this promise of the defendant was *prima facie* evidence of the note having been so presented.

Quære, whether, under these pleadings, the promise of the defendant was admissible as evidence of a waiver of presentment?

ASSUMPSIT against the defendant as maker of a promissory note, payable at *Smith, Payne and Co.'s, London*. The declaration averred presentment at *Smith, Payne and Co.'s*, and non-payment; the first plea denied the making of the note; the second traversed the presentment at *Smith, Payne and Co.'s*. At the trial, before *Coleridge, J.*, at the *Chester Summer Assizes, 1838*, the plaintiff gave no evidence of any presentment at the house of *Smith, Payne and Co.*; but he proved, that after the note became due, the defendant shewed it to the plaintiff's attorney, and promised to pay it by instalments. It was objected, for the defendant, that the second issue had not been proved. The jury found a verdict for the plaintiff for the amount of the note and interest. The defendant's counsel had leave to move for a rule to shew cause why a verdict should not be entered for the defendant on the second issue, if the Court should think that the plaintiff had not given sufficient evidence of presentment.

Evans now moved accordingly.—The proof did not support the second

issue.—[Lord Abinger, C. B.—The defendant is bound to pay the note, if it is presented at a particular place. If he afterwards promises to pay it, is not that evidence, as against him at least, that every requisite has been complied with?—It would be so if the bill were made payable by himself, but not where it is payable at the house of another person.—[Parke, B.—Is not this case governed by *Lundie v. Robertson (a)*?—That case was decided under the old form of pleading.—[Parke, B.—The new rules make no difference. Besides, may not the promise of the defendant amount to a waiver of presentment?—If that be the effect of it, it ought to have been replied by the defendant. The object of the new rules was to make each party acquainted with his adversary's case. If the defendant had been aware that his promise to pay the note would be treated as a waiver of presentment, he might have been ready with evidence to shew that he made no such promise. As it is, he comes to the trial prepared to disprove the fact of presentment only.

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Per Curiam.—The promise to pay by instalments was *prima facie* evidence of presentment. The defendant was not bound to pay the note, unless it had been presented at the place specified in it. Is not his promise to pay it some evidence for the jury of his having made enquiry, and found the presentment correct? The new rules make no difference in the case. Under the old form of pleading, a promise to pay a bill was *prima facie* evidence of presentment; and the effect is the same under the present system of pleading. The rule must be refused.

Rule refused.

(a) 7 East, 232.

HUGHES v. LENNY and another.

ASSUMPSIT for work done, and materials provided, for money paid, and on an account stated. *Pleas*: first, non-assumpsit; second, payment of 42*l.* into Court. At the trial, before Littledale, J., at the Suffolk Summer Assizes, 1838, the following facts appeared in evidence:—The plaintiff, a surveyor, was employed by the defendants, who were also surveyors, to survey and map the parish of Gazeley, in Suffolk. It was not specifically agreed between the parties whether the plaintiff was to be paid a certain sum per day, or whether he was to be paid by the piece. After the work had been finished, and the map and field-books had been prepared by the plain-

The plaintiff was employed by the defendants to survey and map the parish of G., on paper to be provided by them. No sum was agreed upon by the parties to be paid for the work. The work having

been finished, the plaintiff's attorney refused to deliver it, except on payment of 20*l.* 4*s.* 10*d.* He tendered the map and books to the defendants' attorney for inspection, and offered, if the expenses were paid, to send them into the country for the inspection of the defendants. He also asked the defendants' attorney to make a tender, which the latter refused to do. The defendants paid 42*l.* into Court, and the plaintiff had a verdict for 73*l.*

Held, that the plaintiff might maintain an action. That, under this contract, he was not bound to deliver up the map and books before he was paid for his work. That his demanding more than was found by the jury to be due, was no ground of nonsuit, as in such a case the defendants might have tendered the sum due.

Where a party furnishes another with materials to do certain work, an action will lie for the price as soon as it is done, and an opportunity is given for ascertaining whether it is done correctly.

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tiff, the defendants sent their attorney to pay the amount due, and receive the map and field-books. The defendants' attorney called upon the plaintiff's attorney, who produced the map, but refused to deliver it up until the sum of 204*l.* 4*s.* 10*d.*, the amount of the plaintiff's bill, was paid. This bill was framed on the ground of the plaintiff being entitled to a guinea per day. There was conflicting evidence as to whether the plaintiff's attorney, at this interview, produced either for inspection, or for delivery on payment of the above sum, the field-books prepared by the plaintiff, without which the map would have been useless. The jury were of opinion that the field-books had been produced. The plaintiff's attorney requested the defendants' attorney to inspect the map and field-books, which the latter declined to do, alleging his incompetency. The plaintiff's attorney then proposed that the plaintiff's brother should take the map and books into *Suffolk* for the inspection of the defendants, on being paid his expences. This proposition was also declined. The defendants' attorney was then requested to make some offer by way of tender, but this he refused to do, and no tender was ever made. The paper, and other materials employed by the plaintiff, were furnished by the defendants. At the close of the plaintiff's case, the defendants' counsel contended, on the authority of *Goodall v. Skelton* (a), that the plaintiff, not having delivered the goods, could not maintain an action, and that he ought to be nonsuited. The learned judge refused to nonsuit, but directed the jury to consider whether the plaintiff was ready to deliver up the map and field-books. The jury found that the plaintiff was ready to deliver them up, and they gave a verdict for him, with 78*l.* damages, estimating the work at the rate of 7*d.* per acre. The counsel for the defendants again submitted, that the plaintiff ought to be nonsuited, on the ground that he had refused to deliver the books until a larger sum was paid him than was found by the jury to be due. The learned judge refused to nonsuit on this ground also, but gave the defendants leave to move to set aside the verdict, and enter a nonsuit. A rule for this purpose having been obtained in *Michaelmas Term* last,

Kelly and Gunning shewed cause.—The argument that will be used on the other side tends to establish two novel propositions; first, that a man who does work for another must deliver it without being paid for it; secondly that if he asks too much for his work, he is not entitled to recover anything. It is clear law that a party is not bound to deliver work until he is paid for it, unless there be a contract, either express or implied, that credit is to be given, or unless it can be inferred, from special circumstances, that the work is to be delivered before the price is paid. *Goodall v. Skelton*, which will be cited on the other side, has no application here. The only question decided there was, that certain goods not having been in fact *delivered*, an action for goods sold and *delivered* could not be brought for them. Nor is the case of *Sinclair v. Bowles* (b) applicable. That case only decided that a party, who had undertaken to make an article perfect, and had repaired it in part only, could not recover for the value of the work done and materials found. It is clear, that the plaintiff had a lien upon the map and books for the value of his labour. The question whether these maps and books were appropriated to the defendants does not arise here, because the paper and materials were furnished by them. If cloth is sent to a tailor, as soon as the coat is made,

and ready to be delivered to the customer, an action will lie for the price. It is clear, from the facts of the case, that the defendants had ample opportunity of examining the maps and books.

Secondly, the plaintiff is not disentitled to recover at all, because he has asked for more than a jury has found to be due. Here is no specific contract, and it would be hard indeed if he could recover nothing, because he has demanded more than a jury think he was entitled to. The usual time for an application for a nonsuit is at the end of the plaintiff's case; but if the argument of the other side is to prevail, a party may be nonsuited at the trial, after the delivery of the verdict. If the plaintiff demands too much, he does so at his peril; for the defendant may make a tender of the sum really due; and if the plaintiff proceeds, he proceeds at his own risk. He cited *Roberts v. Havelock* (c).

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B. Andrews and Byles, contra.—The plaintiff was not entitled to recover in *indebitatus assumpsit* until he had delivered up the books and map, and thereby given the defendants the benefit of his contract. At all events, he should have shewn himself ready to give up the map and books on receiving what he was entitled to. This he has not done; for he refused to deliver them, except on receiving a larger sum than was due to him. Besides, no proper opportunity was afforded to the defendants of testing the accuracy of the work; for the map and books were kept in *London*, instead of being delivered in *Suffolk*.—[*Parke, B.*—There was evidence for the jury of the defendants having had an opportunity of inspecting the work.]—The true construction of the contract was, that the plaintiff should do the work, and deliver the map and books to the defendants.—[*Parke, B.*—Is not the contract this, that if he will make a survey of the parish, and put it upon paper, and allow the defendants an opportunity of ascertaining the correctness of the work, that they will pay him the value of the work? Now, if, after giving them that opportunity, he refuses to deliver the work, they are bound to make a tender. The plaintiff has a *lien* for the value of his work; but that does not preclude him from bringing an action as soon as he has given the defendants an opportunity of testing the correctness of his work. But if he parts with his map and books, he loses his *lien*.]—The plaintiff has not done all that is necessary to entitle himself to recover.

PARKE, B.—This rule must be discharged. At first sight, the case appeared to be of some nicety, but when examined, contains no difficulty. The question is, whether a debt was due from the defendants to the plaintiff, on which *indebitatus assumpsit* will lie; and also, what was the real contract between the parties. The contract was this; the plaintiff was employed by the defendants to survey land, and put down the result of his survey, upon paper to be provided by the defendants. It is incidental to this contract that he should give the defendants an opportunity of ascertaining the correctness of his work, and until he has done so, he cannot call upon them for payment; but it was no part of the agreement that the work should be delivered before the price was paid. When cloth is sent to a tailor, and he has given his customer an opportunity of seeing whether the coat is properly made, he may send in his bill, and yet retain the coat as a *lien* for the price. The cus-

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tomor may bring an action against him for the cloth, but that can only be after tender of what is due for work and labour. So, by the terms of this contract, a debt was created as soon as the plaintiff had put down on paper the result of his labour, and had allowed the defendants to see whether the work was correctly done or not. The question is, whether, at the close of the plaintiff's and defendants' case, there was evidence from which the jury could see that all the conditions were performed. I think there was evidence. Sufficient time had elapsed to enable the defendants to examine the work. Besides, at the trial, they did not rest their case on that ground. I think it was not part of the contract that the plaintiff was to be ready to deliver up the map and books, on being paid a reasonable price; but there was even evidence of his being ready to do that, as his attorney was willing to give up the map and books on a tender being made. That step, however, was not necessary to be taken, for the plaintiff was at liberty to bring his action as soon as the work had been done, and the defendants had had an opportunity of inspecting it.

ALDERSON, B.—I think this contract has been correctly stated by my brother *Parks*, and that there was abundant evidence of an opportunity having been given to the defendants to examine the work. It was not necessary, with a view to test the accuracy of the map and books, that the parish should be re-surveyed. The defendants might have measured parts of the parish, and having gained certain standard points, they could have ascertained the correctness of the survey as well in *London* as by taking the map into *Suffolk*. The evidence shews that they had ample time for that purpose. The plaintiff has done all that is required; the work has been done in a satisfactory manner, and he is entitled to be paid. If he asked more than was due, the defendants might have tendered the sum due, and have brought trover for the paper

MAULE, B.—I think an action of *indebitatus assumpsit* will lie in the present case. There was sufficient evidence for the jury of the existence of a debt between the parties. When work is done upon the goods of another, a right of action arises as soon as the work is done, and an opportunity given to the other to examine and ascertain whether the work is done correctly. There was a condition of this sort annexed to the present contract, and sufficient evidence for the jury of its having been performed. There was also evidence of the plaintiff's readiness to deliver the map and books on being paid a reasonable sum; for the language of Mr. *Webber* shews that a smaller sum would have been taken if it had been offered. There is no authority for the position that the plaintiff is bound to name the precise sum, on payment of which, he will deliver the goods, and that he cannot recover anything if he names a larger sum than the jury consider due to him. If that were the case, a defendant would be in as good a situation as if he had made a tender. Where goods are delivered, to have work done upon them, there may be a contract that the party employed shall re-deliver them on payment of the price of the work bestowed upon them. That was the case here; there was an independent contract, on the part of the plaintiff, to return the defendants' paper on these terms. I think the plaintiff is entitled to recover, and that the rule must be discharged.

Rule discharged.

ARKWRIGHT and another v. GELL and others.

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THIS was an action tried at the *Derbyshire* Spring Assizes, 1838, before *Park, J.*, when a verdict was found for the plaintiffs, subject to the opinion of the Court upon the following special case, with power to the Court to draw the same inferences from the facts as might be drawn by a jury:—The declaration contained two counts, which, in substance, charged the defendants with diverting from certain cotton-mills of the plaintiffs the water, to which the plaintiffs claimed a right, and which had usually flowed to, and been used for the purposes of the said mills.

The defendants pleaded not guilty, and also pleas denying the right of the plaintiffs to the water, and the Statute of Limitations. Upon all these pleas issues were joined. The special case was as follows:—

The plaintiffs are large cotton-spinners, residing at *Cromford*, in the county of *Derby*, and carrying on business in co-partnership together at certain mills called *Cromford Mills*. The mills are rented by them (as tenants from year to year) of *Richard Arkwright, Esq.*, of *Willersley Castle*, in the county of *Derby*—the real plaintiff in the cause, and for whose benefit the action is brought. The defendants are gentlemen of fortune in the county of *Derby*, and are joint owners of a mineral sough, called the *Meer Brook Sough*, hereinafter described. The action was brought to recover damages from the defendants for the diversion by them of a portion of the water flowing to the *Cromford Mills* down a mineral sough, called the *Cromford Sough*. The precise origin and date of the existence of this sough are not known; but a part of it, towards the mouth, in the township of *Cromford* existed before 1704, and was made, and has to the present time

In the year 1705, certain adventurers undertook to continue and extend an under-ground drain, called *Cromford Sough*, for the purpose of unwatering a portion of the mineral field in the wapentake of *Wirksworth*. They secured their remuneration in the shape of ore raised from the mines lying near and benefited by the sough, in consequence of an agreement with the owners of the mines. The mouth of the sough was close to a stream called the *Bonsall Brook*, and discharged into it a constant flow of water. Below the junction of

these waters, an ancient corn-mill stood, which was worked by their united power. In 1738, the then proprietors of the sough, through whom the plaintiffs claim a reversionary interest in it, granted it for 999 years to one *S.*, with covenants that he should open, and cleanse and repair it, &c. This lease contained a proviso that no forfeiture for not opening and cleansing, &c., the sough should accrue, provided a new sough were made, which should have the same effect of unwatering the mines. In 1771, the lord of the manor being owner of the land through which the *Cromford Sough* was made, and of a piece of land between the mouth of the sough and *Bonsall Brook*, demised the same to *Sir R. Arkwright*, the father of the plaintiff, together with the stream issuing from the sough. This lease contained a proviso, that if by the bringing up of any other sough, or by any other unforeseen and unavoidable accident, the stream from the *Cromford Sough* should be taken away, or lessened, the lessee should have power to take down the mills, &c., and rebuild them on another site. In 1772, *Sir R. Arkwright* erected extensive cotton-mills on the land in question, and in 1789, purchased that land, and the fee-simple in the mills, together with the manor of *Cromford*, including the land through which the sough was made. The present plaintiffs are now owners in fee of the *Cromford* manor and estates, including the cotton-mills. In the mean time, another company of adventurers had begun to construct another mining sough, called the *Meer Brook Sough*, on a much lower level, in the adjoining parish of *Wirksworth*. In 1813, the defendants representing this company, and being proprietors of mines to be drained by means of this sough, agreed with the proprietors of *Cromford Sough*, and the owners of the mines formerly drained by that sough, to unwater a further portion of the mineral field. Accordingly, they extended the *Meer Brook Sough*, the result of which was, that the water which formerly ran through the *Cromford Sough*, to the plaintiffs' mills, was now diverted into the *Meer Brook Sough*, at a lower level. This was the diversion for which the present action was brought.

Held, that although the plaintiffs, by a grant of the watercourse from the owner of the surface, or by twenty years' user, might acquire a right as against him, still that, this being an artificial and temporary watercourse, subsisting for the convenience of the mines, they did not acquire a right to it at common law, as against the owners of the mines.

Held, also, that the plaintiffs did not acquire a right to the watercourse under the Stat. 2 & 3 Will. 4, c. 71, s. 2, as there was no enjoyment "without interruption," and "of right," since the mine-owners were incapable of interrupting the enjoyment, and had no interest to do so.

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continued to be used for the purpose of draining the lead mines in the district of the wapentake of *Wirksworth*, a mining district of great antiquity, parcel of the possessions of the Crown in right of the *Duchy of Lancaster*, including the *Cromford Sough*, and the *Meer Brook Sough*, and the plaintiffs' mills, and the manors and townships of *Wirksworth* and *Cromford*. The mouth of the *Cromford Sough* is in the village of *Cromford*, and near to the mouth is a stream of water, called the *Bonsall Brook*, into which the water from the sough has always discharged itself, so as to form a junction with the course of the brook. Below the point at which the sough water formed this junction with the *Bonsall Brook*, stood an ancient corn-mill, which was worked by means of the waters so united.

To what extent the *Cromford Sough* had been carried previous to the year 1705 did not appear; but it appeared by an agreement, dated the 1st of *October*, 1705, put in evidence by the plaintiffs, that a society or company were then owners of part of the *Hannage* and other soughs, and Sir *P. Gell* and partners of the other part, and also of the *Cromford* and *Bates Sough*, and the composition ore that might be gotten by means of the same; and by that agreement, two persons, of the name of *Burton* and *Hutchinson*, undertook to maintain, support and keep open the *Hannage Sough*, (which the society was obliged to do, by a previous agreement with several owners of mines, dated the 10th of *June*, 1704,) and also with all speed, at their own costs and charges, to settle and establish articles with the miners in *Cromford Moor*, *Dove Stone Leys*, the *Gang Plott*, and *Gang Rake* aforesaid, and other places where mines were to be benefited and unwatered by the *Cromford* or *Bates Soughs*, for their payment of one-fourth part of all the free lead ore that should be gotten in their respective lead mines on *Cromford Moor*, *Dove Stone Leys*, the *Gang Plott* and *Gang Rake*; and out of all veins, mines and rakes that should be afterwards discovered, and receive benefit from either of the said soughs for and as a composition or compositions for the bringing up and maintaining the said soughs, half of which said composition ore was to be paid to the company; and to drive and bring up the said *Cromford Sough*, from the tail or mouth thereof, in the town of *Cromford*, to the mines, veins and rakes of lead ore in *Cromford Moor*, and the said other places, for the more effectually taking of the water from the said lead mines, and laying them dry thereof at a true level to the mouth of the said sough, or as near as the same could reasonably be carried; and that they would, on or before the 1st of *June* then ensuing, begin and open the mouth of the said *Cromford Sough*, and effectually open the same where it had been stopped, and carry on the same at the same level as it had formerly been carried, and respectively keep the said soughs in good repair and order, so that they should be carried to the said veins, rakes, pipes or mines, so that the water standing therein, and troubling the same, might be effectually let off and carried away from the said mines, and the lead ore gotten. And the company, in consideration thereof, assigned to the said two persons one-half of all composition ore that should be gotten, or that should arise by reason of their share of *Cromford Sough*, or *Bates Sough*. In both those agreements there are covenants on the part of *Burton* and *Hutchinson* to Sir *S. Evans*, and the others, to indemnify them from any injury arising from the water of the smelting-mill of Sir *Philip Gell* being diverted from the mill by the *Hannage Sough*, and from all damage that might happen to any of

the inhabitants of *Wirksworth*, by reason of the water being taken away by the *Hannage Sough*.

It also appears by an indenture of lease made on the 8th of *March*, 1738, by Sir *Bibye Lake* and others, under whom the said *Richard Arkwright* claims the reversionary interest in the sough, (and recited in the deed of 1836, hereinafter mentioned,) that those persons forming a society and company were, in 1738, the owners of the *Cromford Sough*, and the composition ore to be gotten by means of it, and to divers mines, veins, rakes and pipes of lead ore within *Cromford Moor* or *Wirksworth*, within the title of the said sough, and they thereby granted for 999 years, to one *Spencer*, the said sough, by the description of "all that sough or water-gate, lying and being in *Cromford Moor*, within the wapentake of *Wirksworth*, called *Long* or *Cromford Moor Sough*, which sough was begun and carried on for the unwatering of divers veins and rakes of lead ore in *Cromford Moor*, to wit, the *Dove Stone Lays*, the *Gang Plott* and *Gang Rake*, within the wapentake and parish of *Wirksworth*;" and also all their share of the composition ore to be gotten by means thereof, and the several mines, veins, rakes or pipes of lead ore, or share of mines in *Cromford Moor*, or *Wirksworth* aforesaid, or either of them, then within the title of the said sough, paying to the lessors one-sixth part of all the ore which should be got for composition in any of the mines or groves then in composition with the said sough; and also one-sixth part of all the ore that should be got by carrying up the level of the said sough, or out of the mines or veins to be discovered thereby, or in any of the mines, veins, rakes or pipes aforesaid, then within the title of the said sough. And the lessee covenanted with all speed to open and cleanse the said sough, from the tail thereof, to the fore-field thereof; and that he should and would from thence open and cleanse and effectually drive forward and carry on the said sough up to the stake or post that had been fixed in or upon the said mines, called the *Dove Stone Lays*, the *Gang Plott* and *Gang Rake* veins, as the mark or plan whereto the said long sough was to be driven, in such manner that the water troubling the said lead mines, agreed to be unwatered by the same, might be effectually carried off, and so as the same might be effectually mined and wrought, and the lead ore gotten out of the same, so far as the level thereof would admit; and should and would keep open a sufficient gate or sough, from the said lead mines to the tail of the sough, so that the water troubling the lead mines might have a free passage from the said lead mines, and that they might be discharged and unburthened thereof, in such manner and method as is usual in mineral cases, and at all times keep the sough open, clean, and in good repair, from the tail or beginning, to the fore-field, or other extremity, as the same should be driven, or carried on, to the above mark as aforesaid; and also work the mines within the title of the sough so as to get the lead ore thereout, provided that if the said lessee should bring up a new sough or level for unwatering any of the mines in composition with the long sough, or within the title of the said sough, and should pay to the said lessors a full sixth part of all the ore to be got by composition, or out of the mines or veins to be discovered in bringing up the said level, or out of the mines within the title of the said sough as aforesaid, as they had before agreed to pay for bringing up the said long sough, then the said lessee should not incur any forfeiture of the lease by reason of not bringing up the said sough, provided that the new sough should as effectually lay dry the mines

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in composition with, or within the title of the said sough, as if the said long sough had been worked pursuant to the covenants as aforesaid. The *Cromford Sough* is now carried into *Wirksworth* township, and just before it enters that district, in *Cromford* township, part of the sough has fallen in, and is in ruin.

These kind of soughs, as are the *Cromford* and *Moer Brook*, are made at a vast expence, and require to be repaired from time to time. The *Cromford Sough* is constantly repaired by the proprietors of it. They are repaired by the parties, proprietors or leasees owning them, and without these repairs they would, in the course of time, fall into decay. There has been an increase in the water flowing down the *Cromford Sough* since Mr. *Arkwright* built his mills in 1772.

In the year 1771, *William Milnes*, of *Cromford*, Esquire, and *Mary* his wife, were, by their trustee, *Richard Hall*, seized of the manor of *Cromford*, within the wapentake of *Wirksworth*, and the soil of the commons and wastes of divers messuages, farms and lands within the same, including the lands through which *Cromford Moor*, or *Long Sough*, was carried, but were not proprietors of the sough itself.

The case then set out an indenture of lease of the 1st of *August*, 1771, by which the said *Richard Hall*, by the appointment and direction of the said *W. Milnes*, and *Mary* his wife, demised unto *Richard Arkwright* and others 'all that river, stream or brook, called *Bonsall Brook*, situate, &c., together with the stream of water issuing and running from *Cromford Sough*, in *Cromford* aforesaid, into the said *Bonsall Brook*, with full liberty and power to and for them (the lessees) to divert, turn and carry the said brook, stream, and water, down the south side of the highway, in *Cromford* aforesaid, and under or over the same highway; and also all that piece or parcel of ground situate, &c., in *Cromford* aforesaid, lying between the *Bonsall Brook* and the intended new cut, and extending in length from the turnpike-road leading to *Mallock Bath*, &c., extending, &c., and containing by measure one acre and two roods, as therein mentioned, together with full and free liberty to and for the said *Richard Arkwright*, &c., to erect and build, or cause to be erected and built, upon the said brook or piece of ground, one or more mill or mills for spinning, winding, &c., silk, worsted, &c., and also such and so many water-wheels, warehouses, shops, smithies, &c., banks, dams, &c., and other conveniences, as they shall think proper and necessary, for the effectual working the said mills, so as the same mills, &c., be erected and built, and from time to time, during the several terms hereinafter mentioned, worked and managed in such manner as not to prejudice the corn-mill in the possession of Mr. *Baxter*, by taking away or diminishing the quantity of water now used, or necessary for working the said corn-mill; to hold the said river, brook or stream, water, piece or parcel of ground, and the said stream or water issuing from the said *Cromford Sough*, with the liberty of diverting the same, from the 25th of *March* then last, for the term of eighty-four years, at the yearly rent of 14*l.*, payable as therein mentioned. Proviso, "That in case it shall happen that, at any time during the continuance of this lease, the water or stream issuing and running from *Cromford Sough* aforesaid, shall, by the bringing up of any other sough, or by any unforeseen or unavoidable accident, be taken away or lessened, so as that there shall not come to the said mills and wheels, intended to be erected in pursuance and

by virtue of these presents, water sufficient for the working of the same, and the said *W. Milnes*, and *Mary* his wife, their heirs, &c., shall not be able otherwise to supply the same with such deficient water, that in that case it shall be lawful for the said *Richard Arkwright*, &c. to take down the said mills, wheels, &c., to remove the same to and erect them upon a piece of waste ground, lying in *Cromford* aforesaid (setting out its abutments); and that the said *W. Milnes*, and *Mary* his wife, and all persons claiming, &c., shall join in a good and effectual lease of the said piece of ground last mentioned, with the mills, &c., to be erected thereon, for so much of the said term of eighty-four years as shall be then to come, at the same yearly rent; and from and after the granting and executing of the new lease, the present lease, and the term of years thereby granted, to cease and be absolutely void."

In the year 1772, a cotton-mill, and other buildings, were erected by the lessees below the junction of the sough water with the *Bonsall Brook*, and at a short distance above the old corn-mill; and the water of the sough has from the time of the erection of the mill, hitherto, been used by the occupiers of the mill for the purpose of turning the wheels and machinery thereof, and this water has formed a material part of the stream by which the mill has been kept in work.

In 1785, an alteration was made by the order of *Mr. Arkwright*, the then owner of the mill, in the course of the stream; the sough water was separated from the brook course, and carried in another but parallel direction, at a higher level, to the cotton mill, by which means the water from the *Bonsall Brook* was made to supply one wheel to the mill, and the sough water the other wheel, and the two streams becoming united again in the mill-yard, and thence flowing in one stream into the river *Derwent*.

In the year 1789, *Mr. Arkwright* (then *Sir Richard Arkwright*,) the father of the present *Richard Arkwright*, Esq., became the purchaser of the *Cromford* estate, through which part of the *Cromford Sough* is cut, including the manor of *Cromford*, the cotton-mills leased to him and his co-partners, but then in his own occupation, and the site of the old corn-mill.

The case then set out the conveyance by lease and release of the 7th and 8th of *April*, 1789, of this property to *Sir Richard Arkwright* in fee. Soon after the execution of the above conveyance, very considerable additions were made to the cotton-mill, part of which was erected upon the site of the ancient corn-mill. The present *Richard Arkwright*, Esq., son of the late *Sir Richard*, is now owner in fee of the *Cromford* manor and estates, including the cotton-mills.

In or about the year 1771, the said *Meer Brook Sough* was commenced at a place called *Meer Brook*, in the manor of *Wirksworth*, within the wapentake of *Wirksworth* (about three miles lower down the river *Derwent* than the spot where the *Bonsall Brook* entered that river,) by a company of proprietors, not connected with the proprietors of the *Cromford Sough*, and at a considerable lower level (about twenty-nine yards) than the *Cromford Sough*. The object of the *Meer Brook Sough* was more effectually to unwater the extensive mineral field in the hollow or valley of *Wirksworth*, containing about 2,000 acres, being the same mineral field as was partly relieved by *Cromford Moor Sough*, but which could not drain the mines below its own level. The case then set out an Act of Parliament of the 29 *Geo. 3*, c. 74, (1789) under which, amongst other persons therein named, *Sir Richard*

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Arkwright, Francis Hurt and Charles Hurt, were made a corporate body by the name of the "*Cromford Canal Company*," with powers to make a canal from *Cromford* to *Langley Bridge*, through several lands therein mentioned, and, amongst others, through the lands of *Sir Richard Arkwright* and the said *Francis Hurt*, and to supply the intended canal, when made, with water from the river *Derwent*, and from all rivers, brooks, streams and watercourses which should be found in digging the canal, or within the distance of 2,000 yards from any part of the canal, or from any reservoirs to be made as therein mentioned, and for that purpose to make and erect all such reservoirs, engines, &c., as are specified in the said Act, with a proviso, "that nothing therein contained should authorize or empower the *Cromford Canal Company*, or any other person or persons, to cut, dig, drive or carry on any sough, level, trench, passage, &c. to or from any of the rivers, streams, soughs, &c., in, from, or by which the mills of *Sir Richard Arkwright* are worked or carried, except from the river *Derwent*, in such manner as in this Act is mentioned; and that it shall not be lawful for the *Cromford Canal Company*, or any other person or persons, for the purpose of the intended canal, or for any other purpose whatsoever, relating to the execution of this Act, to draw off, take from or diminish any water which now supplies, or which at any time hereafter may be found necessary for the purpose of supplying, carrying on or working the mills of *Sir R. Arkwright*, or to do any other act, matter or thing whatsoever to prejudice, obstruct or impede the same, without the consent of the said *R. Arkwright*, his heirs or assigns, for that purpose first had and obtained."

By the sixth clause of the Act, power was given to *Sir R. Arkwright* to raise a weir on the river *Derwent*, and make an aqueduct through his lands to convey water to the canal. This Act was amended by an Act of the 30 Geo. 3, c. 56, (1790) which, amongst other things, enacted, "That if at any time thereafter, any part of the quantity of water from *Cromford Sough* and *Bonsall Bridge*, or either of them, which at the time of the passing of the said recited Act flowed into the river *Derwent*, above *Cromford Bridge*, should pass into the said river at any point below *Cromford Bridge*, or should by any means whatever be diverted into any other course or channel, the quantity of water which should so pass into the river *Derwent*, below *Cromford Bridge* aforesaid, or otherwise be so diverted, should, in ascertaining the quantity of water to be taken for the supply of the said intended canal and collateral cut, or either of them, and also in ascertaining the quantity of water which the river *Derwent* produces at *Cromford Bridge* aforesaid, be deemed and reckoned as part of the water at *Cromford Bridge* aforesaid, anything in the said recited Act, or in this present Act contained, to the contrary in anywise notwithstanding. And it was thereby also provided, that *Sir R. Arkwright* should be entitled to all lead mines discovered in cutting the canal through any lands of his; and that all and every such mines, &c., should be subject to such laws, usages and customs as other lead mines and veins of lead ore, within the wapentake of *Wirksworth*, in the county of *Derby*, are subject and liable to. At the time of this Act passing, the *Cromford Moor Sough* was a sough which supplied water to *Sir. R. Arkwright's* mills. The water from the *Meer Brook Sough* flows into the *Derwent* below *Cromford Bridge*.

An indenture of the 11th of *January*, 1791, was then set out, by which

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certain lands were conveyed by Sir *R. Arkwright* to the *Cromford Canal Company*, in lieu of certain lands which they were empowered to take by virtue of their Act of Parliament, and also full and free liberty, power and authority were granted to the company to take the water for the use of their canal, from and after the same had fallen over the basin between the two mills of the said Sir *R. Arkwright*, by a trunk or pipes under-ground, "so as not to injure, obstruct or prejudice the mills of the said Sir *R. Arkwright*, or the working thereof." The case then set out an Act of the 42 Geo. 3, c. cx. (1802,) for allotting and inclosing the several commons and waste lands within the manor and township of *Wirksworth*, under which certain commissioners were appointed to divide and allot the same to the owners of ancient messuages, &c. The 16th section provided, "That it should be lawful for the owners and proprietors of a certain sough or level called *Meer Brook Sough*, or *Longway Bank Sough*, to continue to work and carry forward such sough or level from time to time, and at all times for ever thereafter, for the purpose of unwatering or draining any lead mine or lead mines within the said manor or wapentake of *Wirksworth*, or otherwise, and to amend and repair the same when and as often as need should be and require," with power, for those purposes, to sink shafts, &c., and make all necessary roads upon, under, through or over any of the allotments to be made in pursuance of that Act, making reasonable satisfaction for all damage done. Mr. *Arkwright* was a land-owner in *Wirksworth* at the time of the passing of this Act, and took an allotment of about forty-four acres, which was made to him under it. In the year 1813, up to which period the *Meer Brook Sough* had been confined to *Wirksworth*, a branch or level into *Cromford*, and under the lands of Mr. *Arkwright*, was projected from the *Meer Brook Sough*, running towards the *Godber* vein, which was connected with the *Gang* mine. And by indenture of the 18th of *November*, 1813, made between *Francis Hurt* and others, proprietors of the *Meer Brook Sough*, and certain mines, of the first part; *John Simpson* and others, lessees of the mineral sough called *Cromford Sough*, and lessees of certain mines and composition ore thereto belonging, under *Charles Brown* and *Henry Dickinson*, and the *Sough Company*, and also proprietors of other mines, and parts of mines, and composition ore, of the second part; and *Charles Brown* and *Henry Dickinson*, for and on behalf of themselves and the rest of their society and companions of certain mines, and owners of the *Cromford Sough*, and likewise of certain mines and composition ore, of the third part; after reciting that *Cromford Moor Sough* had become incapable of unwatering the mines, veins, pipes and rakes of lead ore within the title of that sough, and of several other mines under composition thereto, by reason of the bearing measures of the said mines having been worked to the level of such sough, called *Cromford Sough*; and that the said *Meer Brook Sough* having been driven at a much deeper level than the *Cromford Moor Sough*, was more capable of unwatering the mines, &c., within the title of the said *Long Sough*, and also several other mines then under composition thereto, provided the same was carried forward to, near or under the fore-field of the then present works, or into a vein belonging to the *Cromford Moor Sough*, called *Godber's Vein*, but which would be attended with very considerable expence. "It was witnessed, that in order to carry the several proportions and agreements into effect, the said *Francis Hurt*, and the said several owners of the *Meer Brook Sough Company*, did

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agree with the said *J. Simpson* and his partners, that they the *Meer Brook Sough* Company, with all speed, and agreeably to mineral usage, would, at their own costs and charges, drive, carry on and continue the said *Meer Brook Sough*, or branch thereof, at a true level, to the fore-field of the said *Godber* vein, in such manner as that the water might be carried off, and the said mines, within the title of the *Cromford Sough*, laid dry, so as that the same might be effectually wrought; and would, so long as the said mines, veins, &c., within the title of the *Cromford Sough*, should be duly worked by the leasees or owners thereof, keep open, and in good repair, the said *Meer Brook Sough*, and the branch or level so intended to be made as aforesaid, and that the water might at all times thereafter flow, without obstruction, to the tail thereof. And the said *J. Simpson* and his co-partners, with consent and approbation of the other parties, did thereby covenant, that they would at all times, after the said *Meer Brook Sough* should be brought forward to the fore-field of the said *Godber* vein, so as to unwater and relieve the same, or any other mines, veins, pipes, &c., within the title of the said *Cromford Meer Sough*, pay and render to the same *Francis Hurt* and Company, their heirs, &c., one-twelfth part of the ore to be raised under the level of the *Cromford Sough*, such level to be taken as therein mentioned."

The defendants then, in pursuance of this agreement, worked the *Meer Brook Sough* into *Cromford*, towards the *Godber* vein. During the time that this branch level was being driven towards the *Godber* vein, the fore-field of the *Meer Brook Sough*, at the south-west end thereof, was shut up, by means of wooden-doors and flood-gates, which the defendants thought fit to erect; and these wooden-doors were kept closed, for the most part, till about *March*, 1821, when in contemplation of the agreement of *June*, 1825, thereafter set forth, cast-iron doors or flood-gates were put up by the defendants in the place of such wooden-doors. While these wooden-doors were closed, it did not appear that any actual diversion of the water took place from *Mr. Arkwright's* mills

The case then set out a correspondence between *Mr. Arkwright* and the attorney of the *Meer Brook* Company, on the subject of the *Meer Brook Sough*. About the time of this correspondence, the *Meer Brook Sough* proprietors, in order to the more effectual working of the *Godber* vein, were desirous to extend their works in the manor of *Cromford* above mentioned, so as to unwater the lower levels of that mine. *Mr. Arkwright* was apprehensive that mischief might thereby be occasioned to his mills. Upon this an agreement was made between the *Meer Brook* Company, of the first part, certain lessees of lead mines, of the second part, and *Richard Arkwright*, of the third part. By this agreement, which was without prejudice on either side, all parties reserving to themselves all their rights, claims, &c., the lessees covenanted not to diminish the water in *Cromford Sough*; and the *Meer Brook Sough* proprietors covenanted to close and shut up certain flood-gates erected by them in the fore-field of the *Meer Brook Sough*, at the upper and westerly end thereof, so as to prevent the water escaping through them. There was no proviso that either of the parties might determine the agreement by a three months' notice in writing.

The parties continued to act upon this agreement; and the works were carried on in *Cromford*, in the *Godber* vein, till the month of *July*, 1836. The iron gates were kept shut during that time; and while those gates were

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so kept shut, the works in *Cromford* caused no diversion of the water from the mill of the plaintiffs. In the month of *July*, 1836, the *Meer Brook Sough* proprietors were desirous of carrying the sough further forward, in a westerly direction, in *Wirksworth*, and, for this purpose, it was necessary to remove the iron flood-gates; and, in consequence, on the 9th *July*, 1836, the *Meer Brook Sough* Company gave a notice to this effect to Mr. *Arkwright* and the proprietors of the *Cromford Moor Sough*. These articles of agreement, of the 18th *July*, 1825, were afterwards put an end to by a notice, the object of which was afterwards explained to be a desire on the part of the company to continue the *Meer Brook Sough* in a westerly or south-westerly direction into the mineral field, and within the manor of *Wirksworth*.

By indenture, of the 29th *September*, 1836, between the Hon. C. H. W. *Pelham* and Sir R. *Gunning*, of the first part, the Hon. *John Simpson*, of the second part, and *Richard Arkwright*, of the third part, after reciting at length the before-mentioned indenture of lease, for 999 years, of the 8th *March*, 1738, between Sir *Bibbs Lake* and others, their society and companions, owners in part of the *Cromford Sough*, and others, and its recitals and schedules, as hereinbefore set forth (and after other recitals, not material to be set out,) the said *Pelham* and *Gunning*, by direction of *Simpson*, granted to *Arkwright*, by way of conveyance only, and not by way of warranty, subject to the said term of 999 years, the *Cromford Sough* and composition ore to be got by means thereof, and all other premises demised by the before mentioned indenture of 1738.

By another indenture, of the same date, the said *John Simpson* assigned to a trustee for the said *Richard Arkwright*, some shares in the leasehold interest in the *Cromford Sough*, created by the said indenture of 1738.

The said *Charles Brown* and others, parties to the said recited indenture of the 20th *August*, 1833, under whom the said *John Simpson* derived his title to the estate and interest in the *Cromford Sough*, conveyed by the first stated indenture of the 29th *September*, 1836, were the same persons who were parties of the third part to the before stated indenture of the 18th *November*, 1813; and the said *John Simpson* was a party to the said indentures of the 18th *November*, 1813, and the 18th *July*, 1825.

In *May*, 1837, the *Meer Brook Sough* proprietors caused the iron doors to be removed. The consequence of this was, that the water, which would have otherwise flowed down the *Cromford Sough*, was taken away, and the plaintiffs' mills could not be properly worked by reason of this diversion; and it was for this injury that the action was brought.

A representation having been made to the defendants of the serious consequences which would arise from this diversion of the water, the gates were restored to their original state, without prejudice, however, until the right of the defendants to remove them should be determined.

The defendants have not, nor ever had, any interest in the *Cromford Sough*, or in the lands through which it passes.

Mr. *Arkwright*, the lessor of the plaintiffs, is the owner of the land, under the deed of 1789, and he became also interested in the sough itself, before the diversion complained of, by the deeds before mentioned, of 29th *September*, 1836.

The question for the opinion of the Court was, whether the plaintiffs were entitled to recover.

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Copies of all the deeds, and the Acts of Parliament, and plans of both parties were furnished, and were to be considered as part of the case, and either party to be at liberty to refer to any parts of them which might be thought important.

In *Hilary Term* last, the case was argued by

Sir *W. W. Pollett*, for the plaintiffs.—It appears from the facts of the case, that, in 1771, the owners of the manor and the soil through which the *Cromford Sough* passed, leased to Sir *Richard Arkwright* and others, the stream of water composed of *Bonsall Brook*, and the water from *Cromford Sough*, for the term of 84 years, together with a piece of ground, with liberty to erect cotton mills there. These mills were erected in 1782. In 1789, Sir *Richard Arkwright* became the purchaser of the *Cromford* estate, through which part of the *Cromford Sough* runs, including the manor of *Cromford*, and the cotton mills leased to him and his co-partners. In 1836, certain part-owners of *Cromford Sough* granted to the plaintiffs, by way of conveyance, the *Cromford Sough*, and the composition ore to be got by means thereof. The plaintiffs, therefore, have an interest in the land through which the stream flows; but the defendants have no interest whatever; and the question is, whether the defendants have a right to divert the water of *Cromford Sough* from the plaintiffs' land. It will be contended, on the other side, that a grant cannot be presumed in this case, as it is not to be supposed that the owner of the soil would make one; but that question does not arise here, where the injury accrues from the act of a third party. Can it be said that the defendants, who are merely owners of adjoining land, are entitled to deprive the plaintiffs of rights that have been enjoyed for twenty years. And if they cannot divert the plaintiffs' stream for agricultural, they cannot divert it for mining purposes. In *Balston v. Bensted* (a), Lord *Ellenborough* lays it down, that "twenty years' enjoyment of water in any particular manner, affords a conclusive presumption of right in the party so enjoying it." The same rule is stated in *Bealey v. Shaw* (b). The case of *Brown v. Best* (c), is also in point. In *Mason v. Hill* (d), it was held, that the owner of lands adjoining a stream might maintain an action against a party who had diverted the water, although he himself had not appropriated it.—[*Parke, B.*—I think one of the objects of the judgment in that case was to correct an opinion created by *Williams v. Morland* (e), that an individual could acquire a right to flowing water only by appropriating so much as he required for a beneficial purpose.]—In *The Birmingham Canal Company v. Lloyd* (f), an injunction against draining, preparatory to opening a coal mine, was refused, on the ground of laches for two years, during which time expenses had been incurred. But the Lord Chancellor appeared to think that the right might be established at law. Secondly, the Stat. 2 & 3 *Will.* 4, c. 71, s. 2, enacts, that no easement, which has been enjoyed without interruption for twenty years, shall be defeated by merely shewing an enjoyment prior to such twenty years; and that an enjoyment for forty years shall give an indefeasible right, unless it has taken place under some consent or

(a) 1 Camp. 465
 (b) 6 East, 215.
 (c) 1 Will. 174.

(d) 3 B. & Adol. 304; 5 B. & Adol.
 1; 2 N. & Man 747.
 (e) 2 B. & C. 910.
 (f) 18 Ves. 515.

agreement in writing. In this case, there has been an enjoyment for the full period of forty years, without any consent. The owners of the soil might, within twenty years after the commencement of the easement, have put an end to it; but third persons, like these defendants, can have no right to do so. The private Acts of Parliament restraining the *Cromford Canal Company* from interfering with Mr. *Arkwright's* title to the stream, shew that he has exercised acts of ownership upon this water which have been acquiesced in by the legislature. The provision in the *Wirksworth Enclosure Acts*, enabling the proprietors of *Meer Brook Sough* to carry it forward, cannot give them a right to interfere with the interests of third parties.

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Erle, for the defendants.—There are two points in this case; first, that the plaintiffs have shewn no right to this water; secondly, that the defendants have not been guilty of any wrongful act in diverting it.

First, this is an artificial stream, made for purposes very different from those to which the plaintiffs have applied it. The *Cromford Sough Company*, who made it, acquired no title to the water as against the land-owners, through whose property it flowed. The company had no intention of using the water beneficially; they were employed by the mine-owners to get rid of it as a nuisance. We may infer that the land-owners permitted the *Cromford Sough Company* to pour the waste water over their lands. This water the land-owners afterward use for their own purposes; but they cannot, on that account, compel the Company to pour it for ever over their land. It appears that, in 1738, the lessors, under whom the plaintiffs claim, granted a lease of *Cromford Sough* to one *Spencer*, by which he was bound to cleanse and carry forward the sough. The lease, however, provided, that no forfeiture should take place for an omission to carry forward the *Cromford Sough*, provided the lessee brought up a new sough. So that the parties under whom the plaintiffs claim, must be considered to have had notice that the water might be diverted from *Cromford Sough*. In 1771, *Milnes*, the owner of the soil through which the *Cromford Sough* ran, employs the water from the sough in the beneficial purpose of turning his mill. He afterwards lets that water to *Arkwright*, agreeing to indemnify him if the water is diverted. Is not this a clear declaration by *Milnes*, that he had no title to the water? The land-owners contract to carry this water from the mines; they afterwards employ it beneficially; but they are not entitled to insist that the mine owners shall not drain their mines in such a manner as to divert this water. It was said, in *Williams v. Morland*, that that water was *publici juris*, and that the first title to it was acquired by taking and using it beneficially. That opinion was corrected in *Mason v. Hill*, and is now settled that a natural stream belongs to him through whose land it passes by nature, and that any derivative title must be by grant, or by such an user as affords a presumption of a grant, *Bealey v. Shaw* (g), *Wright v. Howard* (h), *Cankham v. Fisk* (i). It is not enough, to constitute a secondary title to water, that it has been enjoyed merely; it must be enjoyed "as of right." The enjoyment must be adverse, and not by stealth or permission, *Partridge v. Scott* (j), *Bright v. Walker* (k), *Tickle v. Brown* (l), *Beasley v. Clarke* (m),

(g) 6 East, 218.
 (h) 1 Sim. & St. 190.
 (i) 2 Cr. & Jer. 126.
 (j) 3 M. & Wel. 220.

(k) 1 C. M. & R. 211.
 (l) 4 Ad. & Ell. 369.
 (m) 2 Bing. N. C. 705; 3 Scott, 258.

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Monmouthshire Canal Company v. Harford (n). Now it is clear that the *Cromford Sough* proprietors did not take the water as of right, and, therefore, could not communicate to others the right to take it. A land-owner who *suffers* water to flow in an artificial course over his land, cannot, after forty years, acquire a right of compelling another to make it flow in the same course for ever. Can it be said that a land-owner, who permits another for forty years to carry an aqueduct over his land, has acquired a right to have it constantly kept there. If the plaintiffs have the right contended for, they have a right to the flow of water without any increase; but if that right were insisted upon, it might defeat the very object that the sough proprietors had in view, namely, the draining of the mines.

Secondly, the defendants are not guilty of any wrongful Act. They are as lawfully upon the land as the land-holders themselves. They are exercising an ordinary act of ownership, being desirous of getting at the minerals. Can a man, by using the water that is produced by my draining, deprive me of the right of draining further? If the plaintiffs are entitled to have this stream without any diminution, then will the owners of adjoining lands be bound always to keep up the water to a certain level. In *Baleton v. Bensted* (o), the stream was a natural one, had risen to the surface, and had been appropriated. There is an obvious distinction between water that has been appropriated, and water that is hidden. The plaintiffs wish to enjoy an artificial stream, and put an end to all the mining operations in the district, they might as well contend that the plaintiffs, having once erected a steam-engine for the purpose of draining their mines, were bound to continue it for ever, to prevent the failure of the water.

Sir *W. W. Follett*, in reply.—The real question in the case is, whether there has been a diversion or not; for it is utterly unimportant, whether the stream is a natural or an artificial one. No man has a right to obstruct the artificial drain of another, *Wentworth Prec.* vol. 8, p. 562.—[Lord *Abinger*, C. B.—*Wentworth* is a very inaccurate and faulty book.]—The defendants' argument is, that there has been no user as of right for forty years; that the parties, who are supposed to have granted the water to the plaintiffs, in fact, made no grant at all; that they substituted an equivalent in case the water was withdrawn.

It is true that the land-owner made a qualified grant, which he could resume at any time; but, not having done so, it is not in the power of strangers to divert the water.—[*Parke*, B.—The argument on the other side is, that *Miles* knew that the drain was only a mode of getting rid of a nuisance, and that, as *he* could not complain of the subtraction of the water from any mill erected by him, he could not give to another a better title than he himself possessed.]—The plaintiffs have used this water for a period of forty years; they have used it adversely, for no grant or licence is shown. It is of no importance that the diversion was effected by underground operations. If the question had been submitted to a jury, they must have found that Mr. *Arkwright*, and those under whom he claimed, always used this water as of right.

Cur. adv. vult.

PARKE, B., now delivered the judgment of the Court.—The plaintiffs, in

(n) 1 C. M. & R. 614.

(o) 1 Camp. 463.

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this case, are the occupiers of certain cotton-mills, at *Cromford*, in the county of *Derby*, and complain of an illegal diversion, by the defendants, of the water to which they were of right entitled, for the supply of their mills. The defendants, by their pleas, deny that right; and also insist that they have not been guilty of any illegal diversion. A special case was reserved, on the trial, for the opinion of the Court, stating a great number of documents and facts, upon which the Court are not merely to give their judgment on matters of law, but to take the office of the jury by determining whether any, and what inferences of fact ought to be drawn from the facts stated. This course leads to one great inconvenience, as it tends to confound the rule of law with an inference of fact only, which inference might have been varied by a very slight circumstance. From the facts and documents, however, the case appears to be this: in the beginning of the last century, certain adventurers had, in part, constructed, and were proceeding to continue a sough, now called the *Cromford Sough*, for the purpose of draining a portion of the mineral field in the wapentake of *Wirksworth*. How they acquired the right to make the sough, is not stated; it was, however, without doubt, either by virtue of the custom of mining then prevalent, or by the express licence of the owner of the soil through which it was made. The adventurers received their remuneration in the shape of a certain portion of the ore raised from the mines within the level, lying above and benefitted by the sough, (technically called, within the title of the sough,) in consequence of an agreement with the proprietors of the mines.

The right to this easement, with its accompanying advantages, appears to have been the subject of sale and conveyance in that district; for, in 1738, the proprietors leased it for 999 years, for a pecuniary consideration, with a reservation, by way of rent, of a part of the profits.

Mr. *Arkwright*, under whom the plaintiffs claim, and all whose rights they may be assumed to have had, by demise from him, when the cause of action accrued, became, in 1836, the purchaser of the reversion expectant on the determination of that lease; and he also acquired a portion of the interest of the lessees, by a conveyance from some of them. It does not appear to us, that this circumstance affects the question between the parties to this suit. After the sough had been constructed, and a constant flow of water thereby conducted from the mines, the late Sir *Richard Arkwright*, the father of Mr. *Arkwright*, obtained, in the year 1771, a lease for eighty-four years, from the lord of the manor of *Cromford* (who, upon the special case, is alleged to have been the owner of the land through which the *Cromford Sough* was made, and also the owner of a piece of land between the mouth of the sough and the brook into which the water was conveyed,) of that piece of land, the brook, and the "stream of water issuing and coming from *Cromford Sough*," with the right of erecting mills on the piece of land. In 1772, Sir *Richard Arkwright* erected extensive cotton-mills thereon; and, in April, 1789, he purchased that land, and the fee simple in the mills, and the manor of *Cromford*, including the lands through which the *Cromford Sough* was made.

In the mean time, another company of adventurers had begun to construct another mining sough, called the *Meer Brook Sough*, on a much lower level, in the adjoining township of *Wirksworth*. The defendants represent, and have all the rights of that company of adventurers, and must, like the proprietors of the *Cromford Sough*, be assumed to have acted either by virtue

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of a mining custom, or by express licence of the owner of the soil, confirmed by the *Cromford Inclosure Act*, in 1802; and also to have had the authority, prior or subsequent, of the owners of mines drained by that sough, and contributing a certain portion of the ore by way of recompence. These facts are not distinctly found; but we think we must infer that such was the case; and, consequently, that the defendants stand in the same relation to the plaintiffs, as if the owners of those mines had themselves, with the consent of the owner of the soil, constructed the sough for the purpose of freeing their mines from water; for whether they make the sough themselves, or through the agency of the adventurers, is immaterial. In 1813, the defendants, being themselves proprietors of mines drained by it, extended the *Meer Brook Sough*, having made an agreement with the then proprietors of the *Cromford Sough*, and of other mines unwatered by it, and which appear to have been then worked down to the level of that sough, for the purpose of regulating their respective rights, and the recompence to be paid by the latter to the former set of adventurers, for the benefit to be derived by them, by the extension of this sough, and the unwatering by means of it of a further portion of their mineral field below the level of the former sough.

The new sough was, therefore, constructed by the consent of some, if not of all those mine-owners, who had formerly used the *Cromford Sough*, and in part for their benefit; and this circumstance places the defendants in the same position, in respect to the diversion of the surplus water, as if they themselves had been owners of part of the mineral field formerly drained by the *Cromford Sough*, and were now proceeding to unwater a further portion of the same field by means of the new sough. When the *Meer Brook Sough* was thus extended, the water was found to flow into it, and flood-gates were constructed at the end, the closing of which prevented the water from finding its way in that direction, but which, when opened, let off the water which would otherwise have been discharged by the *Cromford Sough*, and thereby prevented it from flowing to the plaintiffs' mill.

In 1825, an arrangement was made for the mutual accommodation of Mr *Arkwright* and the *Meer Brook Sough* proprietors, which was not to affect their rights, and which, having been determined, in 1826, left them in the same situation as if it never had been made; and, the gates being removed, in order to carry the sough further in that direction, and the water thereby diverted from the plaintiffs' mills, the defendants are in the same situation as if no flood-gates had been made, and as if, in the construction of their sough, for the purpose of draining another portion of the mineral field, they had broken the natural barrier which sent the water up and made it flow through the *Cromford Sough*, and so caused the water to pass out, at a lower level, through the *Meer Brook Sough*; and the question is, whether the defendants, by so doing, are rendered liable to an action at the suit of the plaintiffs.

This question, which was most elaborately and ably argued during the last Term, appears to us, strictly speaking, to be one as much of fact as of law, and, when the situation of both parties is fully understood, does not appear to us to be one of much doubt or difficulty.

The stream, upon which the mills were constructed, was not a natural water-course, to the advantage of which, flowing in its natural course, the possessor of the land adjoining would be entitled, according to the doctrine

laid down in *Mason v. Hill*, and in other cases. This was an artificial water-course; and the sole object for which it was made, was to get rid of a nuisance to the mines, and to enable their proprietors to get the ores which lay within the mineral field drained by it; and the flow of water through that channel was, from the very nature of the case, of a temporary character, having its continuance only whilst the convenience of the mine owners required it, and, in the ordinary course, it would, most probably, cease when the mineral ore above its level should have been exhausted. That Sir *Richard Arkwright* contemplated the discontinuance of this water-course, (if the question of his knowledge, in this state of things, can be material,) there is evidence, in the lease made in 1771, which contains a provision for a supply from the river, in the event of the stream being lessened, or taken away, by the construction of another sough; and also that such an event was not improbable, appears from the clause in the second *Cromford Canal Act*, 30 Geo. 3, c. lvi. s. 4. What, then, is the species of right or interest which the proprietor of the surface, where the stream issued forth, or his grantees, would have in such a water-course, at common law, and independently of the effect of user, under the recent Statute, 2 & 3 Will. 4, c. 71? He would only have a right to use it for any purpose to which it was applicable so long as it continued there. A user for twenty years, or a longer time, would afford no presumption of a grant of the right to the water in perpetuity; for such a grant would, in truth, be neither more nor less than an obligation on the mine-owner not to work his mines, by the ordinary mode of getting minerals, below the level drained by that sough, and to keep those mines flooded up to that level, in order to make the flow of water constant, for the benefit of those who had used it for some profitable purpose. How can it be supposed, that the mine-owners could have meant to burthen themselves with such a servitude so destructive to their interests; and what is there to raise an inference of such an intention? The mine-owner could not bring any action against the person using the stream of water, so that the omission to bring an action could afford no argument in favour of the presumption of a grant; nor could he prevent the enjoyment of that stream of water by any act of his, except by at once making a sough at a lower level, and thus taking away the water entirely; a course so expensive and inconvenient, that it would be very unreasonable, and a very improper extension of the principle applied to the case of lights, to infer, from the abstinence, from such an act, an intention to grant the use of the water in perpetuity as a matter of right. Several instances were put, in the course of the argument, of cases analogous to the present, in which it could not be contended for a moment, that any right was acquired. A steam-engine is used by the owner of a mine to drain it; and the water pumped up flows in a channel to the estate of the adjoining land-owner, and is there used for agricultural purposes for twenty years. Is it possible, from the fact of such a user, to presume a grant, by the owner of the steam-engine, of the right to the water in perpetuity, so as to burthen himself and the assigns of his mine with the obligation to keep a steam-engine for ever, for the benefit of the land-owner? Or if the water from the spout of the eaves of a row of houses was to flow into an adjoining yard, and be there used twenty years by its occupiers, for domestic purposes, could it be successfully contended, that the owners of the houses had contracted an obligation not to alter their construction so as to impair

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the flow of water? Clearly not. In all, the nature of the case distinctly shews, that no right is acquired as against the owner of the property, from which the course of water takes its origin, though, as between the first and any subsequent appropriation of the water-course itself, such a right may be acquired. And so in the present case, Sir *Richard Arkwright*, by the grant from the owner of the surface for eighty-four years, acquired a right to use the stream as against him; and if there had been no grant, he would, by twenty years' user, have acquired the like right as against such owner. But the user, even for a much longer period, whilst the flow of water was going on for the convenience of the mines, would afford no presumption of a grant at common law as against the owners of the mines.

It remains to be considered, whether the Statute 2 & 3 Will. 4, c. 71, gives to Mr. *Arkwright*, and those who claim under him, any such right; and we are clearly of opinion that it does not. The whole purview of the Act shews, that it applies only to such rights as would, before the Act, have been acquired by the presumption of a grant from long user. The Act expressly requires enjoyment for different periods "without interruption," and, therefore, necessarily imports such a user as could be interrupted by some one "capable of resisting the claim;" and it also requires it to be "of right." But the use of the water, in this case, could not be the subject of an action at the suit of the proprietors of the mineral field lying below the level of the *Cromford Sough*, and was incapable of interruption by them, at any time during the whole period, by any reasonable mode, and, as against them, it was not "of right;" they had no interest to prevent it, and, until it became necessary to drain the lower part of the field, indeed at all times it was wholly immaterial to them what became of the water, so long as their mines were freed from it.

We, therefore, think that the plaintiffs never acquired any right to have the stream of water continued in its former channel, either by the presumption of a grant, or by the recent Statute, as against the owners of the lower level of the mineral field, or the defendants acting by their authority; and, therefore, our judgment must be for the defendants.

Judgment for the defendants.

WRAY v. MILESTONE.

The plaintiff and defendant had been partners, amongst other things, in the purchase and sale of wool. An account relating

to this and other transactions was struck between them, in which the defendant was debited with a certain sum "to loss on wool." The account shewed a general balance of 15*l.* in favour of the plaintiff, against which sum the defendant wrote the words, "due from me to Mr. *Wray*," and signed his name. After this settlement, the defendant proposed that the plaintiff should take out the amount in butcher's meat, which the latter was willing to do:—*Held*, in an action brought to recover the amount of the item respecting the wool, that the defendant was liable, without an express promise to pay. *Held*, also, that the agreement relating to the meat afforded no answer to the action.

DEBT for goods sold, and on an account stated. The defendant pleaded; first, payment of 10*l.* into Court, averring that he was not indebted to a larger amount. This sum the plaintiff took out of Court, in satisfaction of his debt, pro tanto. Secondly, a set-off for goods sold, and work and labour, which was denied by the plaintiff's replication. At the trial, before the

assessor of the Sheriff of Yorkshire, it appeared that the plaintiff and defendant had been partners, amongst other transactions, in the purchase and sale of wool, and that an account was struck between them relating to this and the other transactions, in which account the defendant was debited with a certain sum "to loss of wool." The account shewed a general balance of 15*l.* in favour of the plaintiff, against which sum the defendant wrote the words, "Due from me to Mr. *Wray*," and signed his name. After this settlement; the defendant proposed that the plaintiff should take out the amount in butcher's meat, which the latter consented to do. The action was brought to recover the item expressed to be "to loss on wool." Two objections were taken to the right of the plaintiff to recover; first, that this being a partnership transaction, it did not appear that a settlement of the partnership accounts had been made, a balance struck, and an express promise to pay given; secondly, that after the agreement by the plaintiff to take out the debt in butcher's meat, a promise to pay on request did not arise. The objections were overruled by the assessor, and the plaintiff obtained a verdict for 6*l.* 3*s.* 4*d.*

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Bliss now moved for a new trial, on the ground of misdirection.—There was no final balance struck upon all the partnership transactions. And even admitting there was a final balance struck, the plaintiff will not be entitled to recover, because there has been no express promise to pay. That this is necessary is plain from the language of *Buller, J.*, in *Foster v. Allanson* (a). "Now here there was an express promise by the defendant to pay the balance, and, therefore, the case cited from *Alleyne* does not apply, for in that case there was no express promise." And again in *Moravia v. Levy* (b), the same learned judge says, "It does not signify in this case how the debt rose. Here is an express promise to pay the balance which had been struck, and that is the ground of the action; otherwise, the objection would have been good." The same view is taken by the learned judges in *Fromont v. Coup-land* (c). It is true that in *Rackstraw v. Imber* (d), an express promise to pay was held to be unnecessary, but that was merely a *Nisi Prius* decision. An express promise is necessary, on the ground that a mere settlement of items does not change the nature of the account. In *Henley v. Soper* (e), the balance due upon the partnership accounts had been fixed by the decree of a colonial Court, and that circumstance might be considered as equivalent to an express promise. The assessor was wrong in not requiring the jury to say whether this was a final settlement or not. Secondly, the agreement by the plaintiff to take the meat superseded the implied promise to pay the amount on request.—[*Parke, B.*—There was no new contract, but merely an assurance on the part of the plaintiff that he would take out the debt in meat.]

Lord ABINGER, C. B.—There is no ground for disturbing this verdict. There is sufficient evidence that this account was final; for there is nothing to shew that the partnership was continuous, and the parties might have

(a) 2 T. Rep. 483.

(b) 2 T. Rep. 483, in notis.

(c) 2 Bing. 170; 9 Moore, 319.

(d) Holt, N. P. C. 368.

(e) 8 B. & Cr. 16; 2 Man. & Ry.

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settled at the end of each transaction, in the same way that ship-owners wind up their accounts at the termination of each voyage. Here there is a distinct acknowledgment that 15*l.* are due on various transactions. The effect of the case in *Foster v. Allanson* is, that the Court will not imply a promise against the probabilities of the case. In this case there was no occasion for an express promise. The transaction of the butcher's meat was nothing more than an expression of readiness on the part of the plaintiff to take the amount of the debt in meat, if the defendant paid it in that way. At all events, the defendant ought to have tendered the meat.

PARKE, B.—I have looked through the assessor's notes during the progress of the argument, and see no ground for a new trial. I entirely dissent from the position, that unless there be an express promise, no action can be brought after a statement of accounts intended to be final. For if there be a settlement of accounts, and a balance struck, no express promise to pay is necessary. The transaction itself explains the nature of the account. The defendant calls for an account, one of the items of which relates to a transaction about wool. The defendant declares himself liable to pay that item, and he signs the account. How then can he refuse to pay? There is no occasion for him to go through the form of saying "I will pay this item." But then it is said, there the engagement to pay on request was superseded by the agreement that the amount should be taken out in meat. This agreement, however, was not made until the account was signed, and the defendant had rendered himself liable. I think, also, it was nudum pactum; the effect of the transaction was, that the plaintiff was willing to take payment in meat, that is all. Independently of the time when it took place, it did not bind the plaintiff to receive payment in that particular manner.

ALDERSON, B.—I am disposed to think that there is in this case an express promise by the defendant to pay the plaintiff. There is an admission, that so much is due in an account, which contains a particular item. The defendant signs the general account; that is a promise to pay the particular item.

MAULE, B.—I am not aware that there need be an express promise to pay; the law requires a promise, but then that promise may be implied. The statement of the account in this case affords sufficient evidence of a promise. With regard to the transaction of the butcher's meat, it is enough to say that it took place after the statement of the account.

Rule refused.

TURNER v. DARNELL.

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KNOWLES moved for a rule to show cause why the defendant should not be discharged from the custody of the sheriff of Middlesex, under the following circumstances:—The defendant having petitioned the Insolvent Debtors' Court for his discharge, was, on the 11th of February, remanded to prison for five months, at the suit of the plaintiff. On the 12th February, the plaintiff lodged a writ of *capias* against him, in the form prescribed by the schedule to 1 & 2 *Vict.*, c. 110, without issuing a writ of summons, or obtaining a judge's order. *Knowles* referred to the 85th section, which enacts, "That in all cases where it shall have been adjudged that any such prisoner shall be so discharged, and so entitled as aforesaid, at some future period, such prisoner shall be subject and liable to be detained in prison, and to be arrested and charged in custody at the suit of any one or more of his or her creditors, with respect to whom it shall have been adjudged at any time before such period shall have arrived, in the same manner as he would have been subject and liable thereto if this Act had not been passed."—[*Parke, B.*—How could a party obtain a judge's order? he could not state that the defendant was about to leave the kingdom. Does not the 85th section leave the case in the same situation as before?]*—*The 2d section of the Statute enacts that all personal actions shall be commenced by writ of summons.—[*Parke, B.*—I have sometimes made an order for a *capias ex maxima cautela*.]*—*The present proceeding against the defendant is a nullity.

A remanded insolvent, before the expiration of his imprisonment, may be detained at the suit of a creditor, without any order of a judge or writ of summons. The 85th section of the 1 & 2 *Vict.*, c. 110, takes his case out of the operation of that Act.

PARKE, B.—We think the 85th section leaves cases of this kind in the same situation as if it had not been passed. The creditor must proceed against his debtor as heretofore, and then there will be no occasion for a writ of summons.

ALDERSON, B.—The 85th section applies to a particular class of creditors, who were expressly mentioned in the Insolvent Debtors' Act.

The other barons concurred.

THE COURT, however, gave *Knowles* the option of taking a rule, which he declined to draw up.

A similar application, in the same case, was afterwards made by *Humfrey* on the 3d May, when the Court refused the rule.

Exchequer.

JACQUOT v. BOURA.

In an action of indebitatus assumpsit for work and labour, with a special count, alleging an employment of the plaintiff and his wife for a year, and a dismissal before the end of the year, the damages laid were 100*l*. The sum indorsed on the writ of summons was 12*l*. 19*s*. The plaintiff, by his particulars, claimed 7*l*. 19*s*. for wages, &c., "and also such further sum, by way of damages, as the jury might think proper to give, for the wrongful dismissal of the plaintiff and his wife without notice. It appeared at the trial, that the plaintiff and his wife had been employed at a yearly salary of 60*l*., and had been dismissed without notice.

Held, that the action was for unliquidated damages, and, therefore, ought not to be tried before the sheriff, under the Stat. 3 & 4 Will. 4, c. 42, s. 17,

ASSUMPSIT. The first count of the declaration was indebitatus assumpsit, for the work and labour of the plaintiff and his wife. The second count stated a special contract, whereby the defendant agreed to employ the plaintiff and his wife for one year, the wages to be 60*l*., and then alleged a dismissal of them before the expiration of the year. The damages were laid at 100*l*. The defendant pleaded; first, non assumpsit; secondly, payment; thirdly, that the plaintiff and his wife obstinately refused to work, wherefore the defendant dismissed them. To this plea there was a demurrer. The plaintiff, by his particulars, claimed 5*l*. 19*s*. for arrears of wages up to the 29th September, 1838, 2*l*. for travelling expences, "and such further sum, by way of damages, as the jury might think proper to give for the wrongful discharge of the plaintiff and his wife without due notice." The sum of 12*l*. 19*s*. was indorsed on the writ of summons. A judge's order having been obtained by the plaintiff for trying this cause before the sheriff, and no objection made on the part of the defendant, the cause was tried accordingly. At the trial, the plaintiff proved that he and his wife had been discharged from the defendant's employment after a service of about three months. The jury found a verdict for the plaintiff, damages 15*l*. only.

Corrie having obtained a rule to shew cause why the writ of trial, and all subsequent proceedings, should not be set aside, on the ground that the action being for unliquidated damages, the judge had no power to order the cause to be tried before the sheriff, under the Stat. 3 & 4 Will. 4, c. 42, s. 17,

C. Jones shewed cause, and contended that the sum indorsed on the writ of summons being under 20*l*., the action must be considered to be for liquidated damages, and, therefore, within the provisions of the Statute.—[*Alderson, B.*—What is to prevent you from obtaining a verdict for 25*l*., or any larger sum short of 100*l*.? I should hesitate to order a writ of trial to issue where the damages in the declaration exceeded 100*l*. The only effect of the indorsement of the debt on the writ is, that the defendant may stay proceedings on payment of that sum. That is the only limitation imposed on the plaintiff.]—If the plaintiff obtained a verdict for 20*l*., he might remit the debt recovered. *Price v. Morgan (a)*, and *Allen v. Pink (b)*, support this view of the case.—[*Alderson, B.*—In *Price v. Morgan* the Court said expressly that the action in substance was for the price of the pony.]—The order was made in the presence of both parties: the defendant should have objected at that time; and having omitted to do so then, was too late in his present application. He cited *Edge v. Shaw (c)*, *Frodsham v. Round (d)*.

Corrie, contrà.—To bring this case within the Statute, two things are

(a) 2 M. & Wel. 53; 2 Gale, 221.

(c) 2 C. M. & R. 415; 4 Dowl. 189.

(b) 4 M. & Wel. 140; 1 Ho. & Harl.

(d) 4 Dowl. 569.

necessary; first, that the sum sought to be recovered shall not exceed 20*l.*; next, that the sum indorsed on the writ shall not exceed that amount. These conditions the plaintiff has not fulfilled; for his damages are laid at 100*l.*, and there is nothing to prevent him from recovering the whole of that sum. The indorsement, which is relied on by the other side, has not the effect of restraining the amount to be recovered, if the defendant allows the four days to elapse without paying the debt and costs. In fact the plaintiff has recovered a sum exceeding the indorsement on the writ. In *Allen v. Pink, Alderson, B.*, said, that in substance the action was for the price of the horse. This is a claim for unliquidated damages. In *Smith v. Brown (e)*, where a cause, over which the sheriff had no jurisdiction, was tried before him, the Court held the trial to be altogether a nullity.

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Cur. ado. vult.

On a subsequent day the judgment of the Court was delivered by

PARKE, B.—This was a case in which we took time to consider whether the cause ought to have been sent for trial before the sheriff, under the Stat. 3 & 4 *Will. 4*, c. 42, 17. [His lordship here stated the facts.] We are of opinion that this is not a case which the Act of Parliament contemplates as fit to be tried before the sheriff. The Act is limited to those cases where the sum sought to be recovered can be indorsed upon the writ, within the meaning of the rule of Court of Hil. T., 2 *Will. 4*. Whether the present claim would be limited to 20*l.*, would depend upon the facts proved at the trial; and that makes it a claim for unliquidated damages. The case, therefore, is not within the section of the Act which authorizes certain actions to be tried before the sheriff. The rule must be made absolute.

Rule absolute.

(e) 2 M. & Wel. 851; 3 Gale, 267, S. C.

COOK v. HUNT.

THIS was an action for a breach of contract in not returning certain casks in which the plaintiff had delivered cider to the defendant. The only plea was the general issue. A summons was taken out to try the case before the sheriff, but was successfully opposed, upon the ground that the action was brought for unliquidated damages; and the plaintiff gave notice of trial for the Hertfordshire Spring Assizes. Subsequently, a summons was taken out to stay proceedings, on payment of debt and costs, which was dismissed; but on the day before the commission day, an order was made, by consent, that the plaintiff should withdraw his plea, and that the defendant should be at liberty to sign judgment forthwith for 11*l. 2s.*, and that upon payment of that sum, together with costs to be taxed by the Master, all further proceedings should be stayed. On taxation, the Master considered the plaintiff entitled to costs upon the higher scale, since, the defendant having refused to try before the sheriff, if the cause had gone to trial, the judge at *Nisi Prius* would have certified that it was a fit cause to be tried before him.

Where, in an action for unliquidated damages, the defendant (who had successfully opposed an application to try before the sheriff) consented at the Assizes to withdraw his plea, and confess judgment, for a sum under 20*l.*, and costs:—*Held*, that the plaintiff was entitled to costs upon the lower scale only.

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Gunning having obtained a rule for the Master to review his taxation citing *Wallen v. Smith (a)*,

Peacock shewed cause, and contended, that, under the circumstances, it was evident the parties had intended that the plaintiff should have the same benefit as if the cause had been tried at *Nisi Prius*.

PER CURIAM.—The terms upon which the proceedings were stayed appear upon the summons, and according to those terms the plaintiff is only entitled to costs upon the lower scale. If he wished for costs upon the higher scale, the summons should have been worded accordingly.

Rule absolute.

(a) 6 Dowl. 103.

ROBINSON and another v. YEWENS.

A party wrongfully arrested in the first instance, and afterwards detained upon a legal warrant, is not entitled to be discharged out of custody, unless it appears that the sheriff concluded with the wrong-doer.

HUMFREY had obtained a rule, calling on the plaintiff and the sheriff of Middlesex to shew cause why the defendant should not be discharged out of the custody of the warden of the Fleet prison, and why the plaintiff, or the sheriff, or one *Sloman*, should not pay the costs of the arrest, and of this application. It appeared from the affidavits, that a warrant to arrest the defendant on a *capias ad satisfaciendum*, at the suit of the plaintiff, bearing date the 8th October, 1838, and having the name of *Nathan* alone inserted in it, was delivered to *Nathan*, who was an officer of the sheriff of Middlesex. Upon the 3d of April, (the warrant being then unexecuted,) *Sloman* another officer of the sheriff, happened to meet the defendant in a banking-house, and then arrested him. The defendant demanded his warrant, but none was produced, and in fact the officer had not any warrant with him at that time, though he had formerly had one at the suit of a person named *M'Claren*. The defendant was taken to a lock-up-house, and there detained. Upon the same day, or the next, (the affidavits were contradictory in this respect,) *Sloman* went to the sheriff's office, and applied to have his name inserted in the warrant against the defendant, at the suit of the plaintiff, which had been delivered to *Nathan*, and still remained unexecuted. The books at the office were searched, and it being found that the warrant was unexecuted, *Sloman's* name was inserted in it, in addition to *Nathan's*, and the warrant was delivered to *Sloman*. It was sworn to be the custom, at the sheriff's office, to enter the name of every defendant, against whom a warrant had issued, in a book; and as soon as an arrest is made, an entry to that effect is made against the name. As long as it appears from the book that the warrant is unexecuted, the common practice is to insert the name of another officer in the warrant, (a blank being always left for that purpose,) upon application by him at the sheriff's office, if it appear that he is likely to have an opportunity of making the arrest. The affidavit of the under-sheriff distinctly denied any knowledge that the defendant had been arrested, or was in *Sloman's* custody when his name was inserted in the warrant; and stated,

that the usual practice of the office had been in no respect departed from in the insertion of his name. At the time the defendant was arrested by *Sloman* in the banking-house, there were several detainers against him in the sheriff's office, and amongst them, one at the suit of *Pearson*, in an action in the Court of Common Pleas. Having applied to a judge at chambers for his discharge in that case, but without success, he removed himself by habeas corpus to the Fleet prison, and a few days previous to the present rule, applied to the Court of Common Pleas for his discharge from the custody of the warden of the Fleet, as to that action, which rule, after argument, was made absolute. In this Court, neither the habeas corpus nor return of the sheriff was before the Court, but the motion was decided upon the affidavits only.

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Kennedy shewed cause, on the part of the sheriff.—The defendant is not entitled to be discharged. A person illegally arrested in the first instance, and afterwards detained at the suit of another plaintiff, whose proceedings have been regular, is not entitled to be discharged out of custody, unless the latter, by collusion, became a party to the previous illegal arrest. Here all collusion between the sheriff and *Sloman* is distinctly denied. The first arrest by *Sloman* was illegal, and was precisely the same as if an utter stranger had taken the defendant into custody. But the sheriff never availed himself of this illegality, nor was he at all cognizant of it. The case is distinguishable from *Barratt v. Price* (a), which proceeded altogether on the ground that the sheriff was a party to the first illegal arrest. It is also distinguishable from *Pearson v. Yewens* (b), since in that case there was no affidavit denying collusion. *Howson v. Walker* (c) is an authority in point. There it appeared that *Herne*, a sheriff's officer, had got over some pales, and thrown up the sash of defendant's window, and afterwards broken open an inner door, in order to arrest him, and all this without any warrant directed to himself, and accordingly arrested the defendant at the suit of *Howson*. The plaintiff's attorney being sent for, and finding *Herne's* mistake and irregularity, sent for one *William Howse*, to whom the warrant was really directed, and gave him charge of the defendant, and *Howse* having another writ against him, at the suit of one *Crowder*, carried him to gaol, and charged him with both these actions; and it was insisted, that as he was illegally in custody at the suit of *Howson*, he was protected from any other arrest. But as to the plaintiff *Crowden*, the Court were of opinion, that an illegal arrest will not protect a man against all his other creditors; but he must still be amenable to the law, unless some privity or collusion be shewn, and the circumstance of employing the same officer does not amount to any proof of that.

W. H. Watson, for the plaintiff, objected that he could not be called upon to pay any part of the costs of *Sloman's* illegality. The only ground on which they were asked was, that more than a year had elapsed since judgment was signed, and it had not been revived by *scire facias*. That, however was rendered unnecessary by the express terms of the *cognovit*.

(a) 9 Bing. 566; 2 M. & Scott, 634. (c) 2 W. Black. 823.
(b) 2 Arnold, 16; 7 Scott, 435.

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Humphrey.—The defendant is entitled to be discharged. *Sloman* is an authorized officer of the sheriff, and had at the time of the arrest a warrant from him in another action against the defendant, at the suit of *M'Claren Barratt v. Price* shews that where the sheriff, by his own illegal act, arrests a defendant, the latter is not in custody under the writ, but is suffering a false imprisonment, which cannot operate as an arrest in the other actions. It is true, that in *Pearson v. Yewens* there was no affidavit denying collusion; but it cannot be doubted that the sheriff was privy to the whole transaction. The defendant was obliged to bring the plaintiff before the Court, as well as the sheriff, as the latter is made the agent of the plaintiff when he receives the writ.

PARKE, B.—I am of opinion that the rule must be discharged. The old rule of law was, that if the sheriff had in his possession several writs against the same party, and arrested him on any one of them, such arrest must be considered as a taking upon all. The case of *Barratt v. Price* made this very proper distinction; viz., that if the first arrest was rendered illegal by the wrongful act of the sheriff, then the usual consequences would not result. The question here is, whether it sufficiently appears that the sheriff, in the first instance, wrongfully arrested the defendant. The affidavits shew that *Sloman*, who was usually employed as a sheriff's officer, but who in this instance had no authority, chose to apprehend the defendant in a banking-house, and took him to his lock-up-house. Now that would not be a wrongful arrest by the sheriff, unless he by some subsequent act adopted the illegality. Whilst the defendant was in the lock-up-house, a warrant, in which the name of *Nathan* was formerly inserted, is altered, and the name of *Sloman* introduced. The question then is, whether that operates as a ratification by the sheriff of *Sloman's* illegal act. If it be, the case falls within the principle of *Barratt v. Price*. We cannot decide upon the return of the habeas corpus, because that is not before the Court. But we have had an opportunity of looking at the judgment of the Court of Common Pleas, in the case of *Pearson v. Yewens*, and it is clear that the decision proceeded on the ground that the sheriff was guilty of collusion, and had adopted the illegal act of the officer. The Court thought that the fact of introducing the name of *Sloman* into the warrant was strong evidence of an intention, on the part of the sheriff, to use that warrant as a justification in any action which might be brought against him, in consequence of the illegal arrest. In that view, it was evidence of an intention, on the part of the sheriff, to ratify the original act. But here we have an affidavit which completely rebuts that presumption. It is distinctly sworn, that at the time the name was altered, the undersheriff did not know of the arrest by *Sloman*; therefore, it is impossible that he could have intended to ratify an act of which he was ignorant. Then the case stands as if the arrest had been made by a perfect stranger, who takes the defendant to his house, and whilst he is there, the sheriff authorizes his arrest by a legal warrant. That is a legal arrest, and does not fall within the principle of *Barratt v. Price*, for in that case there was collusion. I am, therefore, of opinion, that the defendant is not entitled to be discharged, and he must pay the costs of the plaintiff and the sheriffs.

ALDERSON, B.—I am of the same opinion. The old rule of law was, as

stated by my brother *Parks*, that where the sheriff arrested in one action, he must be considered as arresting in all the actions in which he had writs in his office against the same party. *Barratt v. Price* decided, that if the first arrest was illegal, by the wrongful act of the sheriff, the illegality pervaded all. But we are called upon to go a step further, and say, that where an arrest is first made by a stranger, and there is a subsequent detainer by an officer under a legal warrant, that the second arrest is illegal. This case appears to me to fall within the decision of *Howson v. Walker*, rather than *Barratt v. Price*. In *Pearson v. Yewens*, the Court of Common Pleas considered the introduction of the name of *Sloman* in the warrant as an act which shewed collusion, on the part of the sheriff, and that he had gone out of his way in order to cover the illegal act of his officer. But here the affidavits negative collusion and show that it was the usual practice of the sheriff's office, that where a warrant is directed to an officer therein named, and another officer had an opportunity of arresting the defendant, then his name, upon his application, was introduced into the warrant. The introduction, therefore, of *Sloman's* name might be in the ordinary and regular course of the sheriff's duty.

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MAULE, B.—The case resolves itself into a question of fact, whether the sheriff did or did not illegally arrest the defendant in the first instance. In *Pearson v. Yewens*, the Court of Common Pleas came to a contrary conclusion, upon a different state of facts, and upon different evidence, than that before this Court.

Rule discharged, with costs.

LYON and another v. EDWARD HOLT.

ASSUMPSIT on a bill of exchange. The declaration stated, that whereas *W. C. Hobson*, on the first day of March, 1835, made his bill of exchange, and directed the same to one *Thomas Hynes*, and required the said *Thomas Hynes* to pay to the order of the said *W. C. Hobson*, in London, 100*l.* sterling, three months after the date thereof; and the said *W. C. Hobson* then indorsed the said bill to the said defendant, and the said defendant then indorsed the same to *J. and W. Wooster*, who then indorsed the same to the plaintiffs. The declaration alleged presentment generally, not stating it to be in London. There was a count on an account stated.

Plea, to the first count of the declaration, that after the making of the said

his accommodation, and without consideration; that *J. H.* indorsed it to *W.*; that the alleged indorsement by the defendant to *W.* was the said indorsement from the defendant to *J. H.*, and from him to *W.* in the plea mentioned. That the bill became due and was dishonoured; after which the plaintiffs and *J. H.* stated an account in respect of this and other dishonoured bills on which *J. H.* was liable to the plaintiffs, and agreed to take from *B.* renewed bills in lieu of them, and in the mean time not to press any parties for payment of the old bills whilst the new ones were running. The declaration then averred that the substituted bills were accordingly drawn and accepted, and delivered to the plaintiffs without the defendant's knowledge or consent, whereby time was given to the parties in the original bill. At the trial the agreement stated in the plea was substantially proved, but it was also proved that *J. H.* did not indorse the bill to *W.*—*Held*, that the indorsement by *J. H.* to *W.* was a material averment; for unless *J. H.* were a party to the bill, the agreement between him and the plaintiffs did not discharge the defendant, and therefore the plea was not supported, and the plaintiffs were entitled to the verdict.

In the case of a bill made payable at a particular place, an averment in a declaration against the drawer or indorser stating presentment generally, seems to be sufficient after verdict.

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bill of exchange in the declaration mentioned, to wit, on the first day of March 1835, the said bill of exchange was indorsed by the said defendant to certain persons, other than this defendant, carrying on business under the style, firm and description of *John Holt and Co.*, for the accommodation, and at the request, of the said *John Holt and Co.*, and that there was not at the time of the indorsement last aforesaid, or at any other time, any consideration whatever for the last mentioned indorsement; that afterwards, and before the indorsement to the plaintiffs in the said declaration mentioned, to wit, &c., then the said *John Holt and Co.* indorsed the said bill to the said *T. and H. F. Wooster*. And the defendant avers, that the said alleged indorsement by the said defendant to the said *T. and H. F. Wooster*, in the said first count mentioned, was the said indorsement from the said defendant to the said *John Holt and Co.*, and from the said *John Holt and Co.* to the said *T. and H. F. Wooster*, in this plea above mentioned. And the said defendant further says, that before the said bill of exchange became due and payable, to wit, on, &c., the same was duly accepted by the said *Thomas Hynes*, the said drawee thereof, of all which said several premises, in this plea mentioned, the plaintiffs to wit, then had due notice. And the defendant further says, that after the said bill of exchange became due and payable, and after the said non-payment thereof by the said acceptor, to wit, on the 31st day of December, 1835, the said plaintiffs were possessed, as of their own property, and were the holders for value, as well of the said bill of exchange as of two other over-due and dishonoured bills of exchange, on which the said *John Holt and Co.* were liable to the said plaintiffs, as parties to the said two last mentioned bills; and thereupon, to wit, on, &c., a certain account was had and stated between the said *John Holt and Co.* and the plaintiffs, of and concerning the amount due to the plaintiffs, as well upon the said bill in the said first count mentioned, as upon the said two other bills in this plea mentioned; and upon that accounting, the said amount was then ascertained and agreed by and between the said plaintiffs and the said *John Holt and Co.* to be a large sum, to wit, 397*l.* 1*s.*; and it was thereupon then agreed by and between the said *John Holt and Co.* and the said plaintiffs, without the knowledge or consent of the said defendant, that the said *John Holt and Co.*, at the request of the plaintiffs, should, in lieu of the said three bills of exchange, accept for the plaintiffs, and deliver to them the plaintiffs, certain drafts of the plaintiffs upon them the said *John Holt and Co.*, to the amount of the said ascertained amount of the said three dishonoured bills, with certain interest calculated to the time of the said drafts of the plaintiffs becoming due, that is to say, that the said *John Holt and Co.* should accept and deliver to the plaintiffs as aforesaid, three drafts of the plaintiffs upon them the said *John Holt and Co.*, that is to say, three bills of exchange, bearing date respectively the day and year last aforesaid, and payable respectively to the said plaintiffs, or their order, the first of such bills of exchange for the sum of 133*l.* 9*s.* 5*d.*, and payable a certain long time, to wit, two months after the date thereof, the second of such bills of exchange for the sum of 184*l.* 11*s.* 6*d.*, and payable a certain long time, to wit, four months after the date thereof, and the third of such bills of exchange, for the sum of 136*l.* 16*s.*, and payable a certain long time, to wit, eight months after the date thereof, and that the said plaintiffs should deliver up to the said *John Holt and Co.* the said bills so then over-due and dishonoured as aforesaid, when the said three acceptances given to

them in lieu thereof should be paid, and that the said plaintiffs should not sue or press for payment, or in anywise have recourse to any of the parties to the said three bills of exchange, which were then in their hands, so over-due and dishonoured as aforesaid, until after the said three acceptances of the said *John Holt* and Co., given in lieu thereof, should be unpaid when due; and the said plaintiffs thereupon, without the knowledge or consent of the said defendant, to wit, then drew, and the said *John Holt* and Co., without the knowledge or consent of the defendant, to wit, then accepted and delivered to the plaintiffs such three bills as aforesaid, so drawn as aforesaid by the said plaintiffs upon the said *John Holt* and Co., for such amounts, and at such dates as aforesaid, and the said plaintiffs then took, accepted and received the said three drafts of and from the said *John Holt* and Co., for the purposes, and on the terms and stipulations aforesaid; and the said plaintiffs thereupon, to wit, then in consideration of the premises in this plea mentioned, and without the knowledge or consent of the said defendant, promised the said *John Holt* and Co. to deliver up to them the said three bills, so then overdue and dishonoured as aforesaid, when the said acceptances so given in lieu thereof should be paid, and that they, the said plaintiffs, would not sue or press for payment, or in anywise have recourse to any of the said parties to the said three bills of exchange, which were then in their hands, so over-due and dishonoured as aforesaid, until after the three acceptances of the said *John Holt* and Co., so given as aforesaid, should be unpaid when due. And the defendant further says, that the said plaintiffs afterwards did give time to the said parties on the said three bills of exchange, according to the stipulations aforesaid, for a long time, to wit, from the day last aforesaid for two months, and during all that time forbore suing, pressing for payment, or having recourse to any of such parties as aforesaid. Verification.

Plea, to the second count, non assumpsit.

Replication, de injuriâ. At the trial, before Lord *Abinger*, C. B., at the London Sittings after Trinity Term, it appeared in evidence that the defendant had lent the bill of exchange to *Holt* and Co., having indorsed it generally, and that *Holt* and Co., without indorsing it, handed it to *J. and H. F. Wooster*, who indorsed it to the plaintiffs. It was also proved that the plaintiffs forbore, for the space of two months, to sue the parties to the bill. Upon this it was objected by the plaintiffs' counsel, that the plea was not proved, since unless *John Holt* and Co. had been parties and liable on the bill, the defendant would not be discharged by time being given to them. His lordship directed the jury to find a verdict for the defendant, with liberty to the plaintiffs to move to enter a verdict for them for the amount of the principal and interest due upon the bill. A rule having been obtained, calling upon the defendant to shew cause why the verdict should not be set aside, and a verdict entered for the plaintiffs, or why judgment should not be entered for the plaintiffs non obstante veredicto,

Cresswell and *Crompton* shewed cause.—The plea was proved in substance, for the indorsement by *John Holt* was an immaterial averment, and did not require to be proved.—[*Parks*, B.—Surely it was essential to prove that *John Holt* was indebted to the plaintiffs, either by indorsement or otherwise; the plea would not be good if you struck out his indorsement.]—The plaintiffs have made an agreement with *John Holt*, the effect of which is to

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give time to the acceptor. The acceptor may take advantage of this agreement, and to enable him to do so, it is not necessary that the contract should be *with* him.—[Lord *Abinger*, C. B.—Your argument is, that the acceptor, in an action brought against him, might avail himself of this agreement between the plaintiffs and *Holt*.]—The agreement would be a defence to the acceptor, on the ground that when any payment is made on a bill, the acceptor may say that payment is made for him.—[Lord *Abinger*, C. B.—How can an acceptor refuse to pay his bill, because somebody else has made an agreement that he shall not be sued?—He may consider the contract as made for his benefit, and ratify it accordingly.]

R. V. Richards, contra.—It is assumed, on the other side, that this is an agreement to suspend the remedy against the acceptor, but that is not the case. The rule is, that if the holder of a bill enters into a compromise with the prior indorsers, he discharges the subsequent ones; and the reason is, that if he were to resort to the subsequent indorsers, they might sue the very party whom he had indulged, and so his agreement to give time would be violated, *Claridge v. Dalton* (a), *English v. Darley* (b). But the rule extends no farther.—[Lord *Abinger*, C. B.—I thought the plea was bad, as it did not aver that the acceptor had notice of this agreement. But a question may arise, whether the acceptor is not to be presumed, until the contrary is shewn, to have adopted a contract made for his benefit. The case of *Atkin v. Barwick* (c) seems applicable.—[*Alderson*, B., referred to *Hawshaw v. Rawlings* (d).]

Cresswell then contended, in arrest of judgment, that the declaration was bad, on the ground that it did not state a presentment in London. And he cited *Gibb v. Mather* (e), *Sanderson v. Bowes* (f), *Ambrose v. Hopwood* (g).—[*Parks*, B.—The question is, whether, after verdict, a statement that the bill was presented to the acceptor would not mean that it was presented according to its tenor.]

On a subsequent day, Lord *Abinger*, C. B., said the Court was of opinion that the plea had not been proved, and, therefore, that a verdict would be entered for the plaintiffs, but that the defendant might have a rule to shew cause why the judgment should not be arrested.

PARKE, B.—This plea proceeds on the ground that time given to the principal discharges the surety. But if we strike out the allegation that the bill was indorsed to *Holt* and Co., nothing appears except an agreement with a stranger, which is no bar.

Rule absolute to enter a verdict for the plaintiffs.

The cause having been afterwards settled, no argument took place on the rule for arresting the judgment.

(a) 4 M. & S. 226.

(b) 2 B. & Pull. 61.

(c) 1 Stra. 165.

(d) *Id.* 23.

(e) 2 C. & Jer. 254; 8 Bing. 214; 1 M. & Scott, 387.

(f) Bayley on Bills, 175.

(g) 2 Taunt. 61.

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(The Case of the Canadian Prisoners.)

IN Hilary Term, January 24th, 1839, *Rosbuck* moved for a habeas corpus to be directed to *William Batchelder*, the gaoler of Liverpool, commanding him to bring up the bodies of *John G. Parker*, *Randall Wixon*, *James Brown* and *Leonard Watson*. He moved, on the affidavits of Mr. *Ashurst* and his clerk, who stated that they were detained under a warrant which recited that the prisoners had been convicted of treason, which statement was believed to be untrue; and that they had not been tried in any court of law. In answer to an intimation of Lord *Abinger*, that the application ought to be made on affidavits from the prisoners themselves, *Rosbuck* submitted that this was not necessary, on the authority of the case of the *Hotentot Venus* (a).

PER CURIAM.—The circumstances of that case appeared to indicate that the party was under coercion. Before we discharge a party from custody, we must have his own affidavit; or must be satisfied by the affidavit of others, that no affidavit can reasonably be expected from the party himself.

On the following day, *Rosbuck* renewed his application, on affidavits of the four prisoners themselves. The deponents alleged, that they had never been arraigned, tried, convicted or sentenced, by any Court in Canada or elsewhere; and that they were ignorant of the term for which they were detained. He admitted that the writ of habeas corpus did not issue as a matter of course; but he contended that the facts deposed to by the prisoners afforded a good *prima facie* ground for granting it.

A writ of Habeas Corpus, to discharge a party out of custody, ought to be moved for on the affidavit of the party himself, unless it be shewn to the Court that from coercion, or otherwise, he is not in a situation to make such affidavit.

A return to a writ of Habeas Corpus, directed to the gaoler of Liverpool, commanding him to bring up the body of a prisoner in his custody, for the purpose of discharging him, stated that by a statute of the province of Upper Canada, it was enacted, that upon petition of any person

charged with high treason, committed in that province, preferred to the lieutenant-governor before the arraignment of such prisoner, and praying to be pardoned for his offence, it should be lawful for the lieutenant-governor to grant a pardon to such person in her Majesty's name, upon such terms and conditions as might appear proper; that the prisoner was indicted for the crime of high treason, and before his arraignment petitioned the lieutenant-governor, confessing his guilt, and praying that her Majesty's pardon might be extended to him, upon such conditions as the lieutenant-governor should see fit; that the lieutenant-governor consented that mercy should be extended to the prisoner, on condition of his being transported to Van Diemen's Land for his natural life, to which terms the prisoner assented that there being no means of transporting him directly from Upper Canada to Van Diemen's Land, it was necessary to take him to Quebec in Lower Canada, that being the most convenient place for the purpose; whereupon, and in order to carry the condition into effect, the prisoner was conveyed, by warrant of the governor of Upper Canada into Lower Canada, and there, by warrant of the governor of Lower Canada, delivered into the custody of the sheriff of Quebec for safe keeping, until he could be transported; that there not being any means of conveying him from Lower Canada directly to Van Diemen's Land, it was necessary to convey him to England; that for the purpose of being conveyed to England, he was delivered by the sheriff of Quebec into the custody of the captain of a vessel; that the captain of the vessel having arrived with the prisoner at Liverpool, and there being no means ready for conveying him immediately to Van Diemen's Land, it was necessary that he should be placed in some safe custody until such means could be provided; that the gaol of Liverpool being the fittest place for that purpose, the captain delivered the prisoner into the custody of the gaoler, who was keeping him in his custody whilst means were preparing for transporting him to Van Diemen's Land.

Held, that the prisoner was not entitled to his discharge: on the ground that having confessed himself guilty of treason committed in Canada, he was liable to be tried in England, and therefore every subject of this realm would be justified in detaining him in custody until he should be dealt with according to law.

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The writs having been granted, the gaoler made the following return (mutatis mutandis) in the case of each prisoner:—

"I, *William Batenseldor*, keeper of Her Majesty's jail, of and for the borough of Liverpool, in the writ to this schedule annexed named, do certify and return, in obedience to the said writ, that by a certain statute of Her Majesty's province of Upper Canada, in North America (b), intituled 'an Act to enable the government of this province to extend a conditional pardon, in certain cases, to persons who have been concerned in the late insurrection,' made and passed in the first year of the reign of Her present Majesty, by the Queen's most excellent Majesty, by and with the advice and consent of the legislative council and assembly of the said province, under and by virtue of a certain Act of Parliament made and passed in the thirty-first year of the reign of His late Majesty King *George* the Third, intituled 'an Act to repeal certain parts of an Act passed in the fourteenth year of His Majesty's reign, intituled an Act for making more effectual provision for the government of the province of Quebec, in North America, and to make further provision for the government of the said province;' and which first-mentioned statute was duly passed by the legislative council and assembly of the said province of Upper Canada, and assented to, in Her Majesty's name, by the person who had been, and was appointed, at the time of passing the said first-mentioned statute, as aforesaid, by Her Majesty, to be the governor of the said province of Upper Canada; reciting that there was reason to believe that among the persons concerned in the late treasonable insurrection in that province, there were some to whom the lenity of the government might not improperly be extended, on account of the artifices used by desperate and unprincipled persons to reduce them from their allegiance. It was amongst other things enacted, that upon the petition of any person charged with high treason committed in the said province, preferred to the lieutenant-governor before the arraignment of such prisoner, and praying to be pardoned for his offence, it should and might be lawful for the lieutenant-governor of the said province, by and with the advice and consent of the executive council thereof, to grant, if it should seem fit, a pardon to such person in Her Majesty's name, upon such terms and conditions as might appear proper, which pardon being granted under the great seal of her Majesty's said province, and reciting in substance the prayer of such petition, should have the same effect as an attainder of the person therein named for the crime of high treason, as far as regarded the forfeiture of his estate and property, real and personal. And that in case any person should be pardoned under that Act, upon condition of being transported, or banishing himself from that province, either for life or for any term of years, such person, if he should afterwards voluntarily return to that province without lawful excuse, contrary to the condition of his pardon, should be deemed guilty of felony, and should suffer death as in case of felony. The return then set out the provisions of a Canadian statute, passed in the seventh year of *William* the Fourth, and empowering the governor of the province, in other cases than those of treason and murder, to commute the sentence of death for transportation for life, or term of years or other punishments; and another colonial Act for the transportation of convicts, made in the ninth year of *William* the Fourth. The

return then proceeded thus:—And I do further certify, that after the passing of the said first-mentioned statute, to wit, at a Special Session of Oyer and Terminer and gaol delivery, began and holden at Toronto, in the home district of the said province, on Thursday, the eighth day of March, in the first year of the reign of her said Majesty, before the honourable *John Beverley Robinson*, Chief Justice of the said province, and others his fellows, justices and commissioners of our said lady the Queen, under and by virtue of her said Majesty's commission, under the great seal of the said province, issued in pursuance of another statute of Her Majesty's said province, duly passed in the same manner, and by the same authority as the said first-mentioned statute, on the twelfth day of January, in the first year of Her Majesty's reign, and intituled 'an Act to provide for the more effectual and impartial trial of persons charged with treason, or treasonable practices, committed in this province.' The said *J. G. Parker* was indicted for the crime of high treason; and before the arraignment of the said *J. G. Parker*, he, the said *J. G. Parker*, humbly petitioning the lieutenant-governor of the said province, in accordance with the said statute first herein mentioned, confessing his guilt of the treason charged against him, as aforesaid, and professing his penitence, and praying for the merciful consideration of his case, and that her Majesty's gracious pardon might be extended to him, upon such conditions as the lieutenant-governor of the said province, by and with the advice of the said executive council, should see fit. And the said lieutenant-governor, by and with the advice of the said executive council, did, in Her said Majesty's behalf, consent that mercy should be extended to him, the said *J. G. Parker*, upon the conditions following: that is to say, that the said *J. G. Parker* be transported, and remain transported, to Her Majesty's penal colony of Van Diemen's Land, for and during the term of his natural life; to which terms and conditions the said *J. G. Parker* did assent; and the said lieutenant-governor did thereupon, in Her Majesty's name, on the twenty-second day of October, in the year of our Lord one thousand eight hundred and thirty-eight, aforesaid, by letters patent under the great seal of the said province of Upper Canada, dated the day and year last aforesaid, pardon, remit and release the said *J. G. Parker* of and from all and every punishment whatsoever which might be inflicted upon him, the said *J. G. Parker*, for or by reason of the treason so as aforesaid confessed by him, upon condition, nevertheless, that he, the said *J. G. Parker*, should be transported, and remain transported, to the said penal colony of Van Diemen's Land for and during the term of his natural life. And I do further certify and return, that there being no means of transporting the said *J. G. Parker* directly from Upper Canada, aforesaid, to Van Diemen's Land, aforesaid, it became, and was necessary, to take him to Quebec, in Her Majesty's province of Lower Canada, in North America, for the purpose of carrying the said condition in the said pardon into effect, the said place called Quebec being the readiest and most convenient place for that purpose. Whereupon, and in order to carry the said condition into effect, the said *J. G. Parker* was, after the said pardon, conveyed, by the authority and warrant of the said lieutenant-governor of Upper Canada, from the said province of Upper Canada unto the said province of Lower Canada; and was there, upon his arrival in Lower Canada aforesaid, by virtue of a warrant in that behalf of Sir *John Colborne*, governor of the said province of Lower Canada, delivered into the custody of the sheriff of the district of

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Quebec, in Lower Canada aforesaid, for safe keeping, until he could be transported according to the said condition, the same being the proper and most convenient custody in that behalf. And I do further certify and return, that there not being any means of conveying the said *J. G. Parker* directly from Lower Canada aforesaid, to Van Diemen's Land aforesaid, according to the said condition, it became, and was necessary, in order to carry the said condition into effect, to carry the said *J. G. Parker* to England, to be taken from thence to Van Diemen's Land in fulfilment of the said condition; and thereupon afterwards, to wit, on the seventeenth day of November, one thousand eight hundred and thirty-eight, the said *J. G. Parker* was delivered by the said sheriff of Quebec into the custody of *Digby B. Morton*, captain of the bark Captain Ross, for the purpose of being conveyed to England aforesaid, to the end that the said *J. G. Parker* might be thence again transported to Van Diemen's Land, as aforesaid; and the said *Digby B. Morton* having arrived with the said ship at Liverpool, as aforesaid, to wit, on the seventeenth day of December last, with the said *J. G. Parker* on board thereof, and there not being the means immediately ready for conveying him from Liverpool, aforesaid, to Van Diemen's Land, as aforesaid, it became, and was necessary, that the said *J. G. Parker* should be placed in some safe custody until the means could be provided of conveying him to Van Diemen's Land, as aforesaid; and the said jail of and for the said borough of Liverpool being the fittest and most convenient place for that purpose, he, the said *Digby B. Morton*, did, on the day and year last aforesaid, deliver the said *J. G. Parker* into my custody, at Liverpool aforesaid; and I have kept him in my custody whilst means have been and are preparing with all possible dispatch, for the causing the said *J. G. Parker* to be transported to Van Diemen's Land, as aforesaid; and these are the causes of my detaining the said *J. G. Parker* in my custody, and whose body I have ready, as by the said writ I am commanded."

The returns having been made, the Attorney General moved that the return made in the case of one of the prisoners, *William Alves*, should be read. The return was read accordingly; and, on the motion of *Hill*, ordered to be filed (a).

Hill, Falconer, Rosbuck and *Fry*, then moved that the prisoners should be discharged, and that the return should be quashed for insufficiency. The first objection was, that there did not appear to have been any conviction, without which no person in this country would be authorized to detain the prisoner in custody. That the right of detention, if it existed at all, could exist only by virtue of the transportation act, 5 Geo. 4, c. 84. That that statute did not authorize the detention in the present case, because by its very terms it applied to "convicts" only. That the gaoler must, therefore, rest his justification upon the Provincial Act of Upper Canada, 1 Vict., c. 10. That Act was void, because it was repugnant to the law of England, to which all Colonial legislature must conform, 1 Black. Com., 108. It authorized the

(c) This case was argued at great length during several days of Hilary and Easter Terms. It has been deemed unnecessary to report the arguments in full, as they may be seen at length in 1 Per. & Dav. 516. The reader is also

referred to an elaborate report of the case as it was argued in both Courts. This report is by Mr. Fry, one of the counsel for the prisoners, and is preceded by an able Introduction on the Writ of Habeas Corpus.

governor to inflict any punishment short of death on such persons as confessed their guilt before arraignment. And the effect of such an act was that a party who was in prison, who was not *sui juris*, who had no one to explain the consequences of his petition, or to attest his signature, who was destitute of that protection which the law of England casts around every prisoner, might, without appearing in open court, or seeing the face of a judge, be transported for life, or incur any punishment short of death. The prerogative of pardon could not be communicated to the governor of Upper Canada by an Act of the legislative council of that country, it could only be delegated by a commission issuing from the Crown, and no such commission had been shown.

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Secondly, that the return did not state any judgment of transportation, but merely that the governor, on the prisoner's application, had commuted the sentence. The governor, however, had no such power. Transportation *in invitum* did not exist at common law; the Sovereign of this country had no authority at common law to commute the sentence of death for that of transportation *in invitum*. Whenever transportation was thought expedient the legislature was resorted to, or in cases where that course was not adopted judgment of death was recorded against the offender, and the record was then used to enforce the milder punishment of transportation. But there could be no doubt that if a prisoner preferred death to transportation the Crown could not inflict the latter punishment upon him. The return averred that the prisoner assented to the terms of his sentence, but such assent could not be valid, and in fact resembled an assent to be maimed or murdered, which would be utterly void as being repugnant to the laws of God and man; besides in this case the assent had been revoked. Here the term of transportation commenced *in futuro*. That was contrary to the law of England, since the period of transportation was thereby made to depend upon the malice or caprice of the individuals who might have the prisoner in their custody.

Thirdly, that the governor of Canada as well as the local legislature had no authority beyond the bounds of that province. That they might banish an offender beyond the limits of their province, but that they could not detain him in custody in another country. The maxim of the civil law, "*Extra territorium jus dicenti impune non paretur*," Dig. lib. 2, tit. 1, s. 20, was founded in reason and justice, and was applicable to the present case. As regarded the punishment of criminals, Canada in relation to England was a foreign country. That the penal law of this country was strictly local, was plain from the judgment of Lord Loughborough in *Folliott v. Ogden* (d), and from that of Lord Ellenborough in *Wolff v. Oxholm* (e), the same principle was recognized in *Buchanan v. Rucker* (f), and the learned counsel also referred to the Statutes 11 Geo. 4, and 1 Will. 4, c. 30, and 1 & 2 Vict. c. 9.

Fourthly, that assuming the transportation to be legal, it had been illegally carried into operation, for the governor had no authority to direct the master of the vessel to carry the prisoners to Liverpool, the Crown not having in any legal or authentic form directed the gaoler at Liverpool to receive or detain them. That the warrant was not directed to *Mr. Batchelder*, but merely "to such persons as may be lawfully authorized to receive the same."

(d) 1 H. Black. 135.
(e) 6 M. & Sel. 99.

(f) 1 Campb. 63. 9 East, 192.

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The return did not shew that *Mr. Batchelder* had the slightest authority to interfere in the matter. The learned counsel referred to 2 Instit. 186, and 1 Bla. Com. 136.

Fifthly, the return was bad for want of particularity. It did not enable the Court to see the cause of the prisoner's detention. It might be admitted that absolute certainty was not necessary in a return, but some degree of certainty was indispensable. In the present case it did not sufficiently appear that the prisoner had petitioned the governor at all, still less what the nature of his petition was. It was alleged that he had confessed his guilt, but all the facts ought to have been set out to enable the Court to see whether they amounted to a confession. If the prisoner assented to the terms of the pardon, his mode of assenting ought to have been shown. Again, the warrants of *Sir John Colborne* and *Sir George Arthur*, the governors of Upper Canada, ought to have been set forth. It was decided in *The King v. Clark (g)*, that where a party is committed to one who is not an officer, there ought to be a warrant in writing and it ought to be returned. The gaoler was bound to shew not only that the prisoners were liable to be detained, but that he was the party authorized to detain them. The case of *The King v. Suddis (h)* was distinguishable, because there the prisoner was a soldier and amenable to a military jurisdiction. They cited *Burdett v. Abbot (i)*, *Buskell's case (j)*, *Anonymous (k)*, *Deybel's case (l)*, *Watson v. Clerke (m)*, *Nash's case, (n)*, *Souden's case (o)*, *Thomlinson's case (p)*, *Seeles's case (q)*.

Sir J. Campbell, A. G., Sir R. M. Rolfe, S. G., Sir F. Pollock, and Wightman, in support of the return, contended, as to the first objection, that although there was no conviction or judgment of transportation, still the proceedings taken in the case were equivalent to a conviction. The prisoners had confessed their guilt, had petitioned for pardon, and had obtained it on condition of submitting to transportation. The mercy of the Crown had been extended towards them on a certain condition, which they now declared their reluctance to fulfil. The Crown, however, had the power of enforcing this sentence, even *in invitum*. The Crown even at common law could commute a higher punishment for any inferior one that was not repugnant to law, as, for instance, maiming and mutilation. This power had been frequently exercised. It was done in the case of the *Earl of Clancarty*, in the reign of *Will. 3*, who was pardoned for high treason on condition of transporting himself for life. In 1704, *Sir J. Maclean* was pardoned on the same terms. The same course was taken with *Margery Day*, in 1725, and with many other persons who were involved in the rebellion of 1745. The learned counsel stated that the patents for these pardons were still in the patent office, and that notes of them had been furnished by *Mr. Dealtry*. The validity of pardons of this kind had been recognized by the Stat. 20 Geo. 2, c. 46, and by the Irish Act, 38 Geo. 3, c. 78, passed in consequence of the Irish rebellion. This power of pardon had therefore been frequently exercised by the Crown and recog-

(g) 1 Salk. 349. 12 Mod. 114.
(h) 1 East, 306.
(i) 14 East, 1.
(j) Vaughan, 135. T. Jones, 13.
How, St. W. 999.
(k) 1 Ventr. 336.

(l) 4 B. & Ald. 243.
(m) Carth. 69, 75.
(n) 4 B. & Ald. 295.
(o) 4 B. & Ald. 294.
(p) Cro. Car. 557.
(q) Id.

nized on the part of the legislature. But, supposing the condition to be void then the pardon was void also, and the prisoner would be bound to undergo the sentence of death.

Secondly, it was erroneously assumed on the other side, that Canada was a foreign country. Canada was a colony of this country—a member of the empire—and, therefore, England was bound to maintain her judicial proceedings. The cases of *Folliott v. Ogden* (r), *Wolff v. Oxholm* (s), were therefore inapplicable.

Thirdly, the pardons were justified under the Act of the colonial legislature, which was passed by virtue of a power to pass Statutes, granted by the 31 Geo. 3, c. 31. The Act was one of mercy and humanity, and in complete accordance with the spirit of the English laws. The colonial legislature could not be incompetent to pass an Act by which persons confessing their guilt, even before trial, might be subjected to punishment. It is clear from the language of the Habeas Corpus Act, 31 Car. 2, c. 2, s. 13, that a contract for transportation, and a prayer to the same effect, were not necessarily illegal. The language of the Canadian Act, "on such terms and conditions as might appear proper," would not of course warrant any punishment unknown to the law. There was no force in the objection that the attainder worked only a forfeiture of property, for there would have been an absurdity in allowing a person pardoned of high treason on condition of transportation to hold landed property in Canada. The other Statutes set forth in the return shewed that the practice of transportation prevailed in Canada. Its existence in the colonies as a legal punishment was expressly recognized by the recital of the 17th section of the 5 Geo. 4, c. 84. The learned counsel then referred to the Statutes relating to transportation, and contended, that as they could not be held to have conferred upon the colonies the power of transportation, it followed that the recital in the 17th section of the Stat. 5 Geo. 4, c. 84, was an express legislative recognition that there did exist local colonial laws under which transportation might be inflicted. The practice of transportation from the colonies had subsisted for a long period of time without being questioned, and it would be dangerous to hold now that all the sentences of transportation from them had been illegal. The pardon, therefore, being good in Canada, the result was that the sentence might be carried into effect by virtue of the prerogative of the Crown.

Fourthly, but then it was objected that the transportation had been conducted in an irregular and illegal manner, and that the government of Lower Canada had no authority to interfere. The answer to that argument was, that the transportation itself being legal, every necessary means must be resorted to to give effect to it. In an inland colony that could be done only by the assistance of the authorities of the countries lying between that colony and the place of embarkation of the convicts; nor was a warrant necessary in this case, for the prisoners were in execution under a process equivalent to a conviction in Court, and when that was the case a warrant was unnecessary. 1 Black. Com. 136. In the case of *The King v. Clarke* (t), it was held, that in a commitment for contempt, a warrant was not necessary.

Fifthly, to the last objection, that the return was not sufficiently explicit,

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(r) 1 H. Black. 135.
(s) 6 M. & Sel. 99.

(t) 1 Salk. 349. 12 Mod. 114.

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the answer was that it sufficiently apprized the Court of the grounds of the prisoner's detention. They contended that *Res v. Suddis* (u), and *Barnes's* case (v), were decisive as to the necessity of not setting out the documents verbatim. That the two cases cited on the other side were distinguishable, the return in *Bushell's* case (w), having been quashed on the ground of the order of the Court being bad for uncertainty, and in *Secles's* case (x), on the ground that the council had no jurisdiction.

But, although the Court should hold that the return ought to be quashed for insufficiency, still the prisoners would not be entitled to their discharge. It appeared from the return that they were in custody on a charge of high treason, committed within Her Majesty's dominions, and that they had confessed their guilt. If, therefore, the Statute were a nullity, and the pardons were renounced, they would be liable to be tried either in England or Canada. The 16th section of the Habeas Corpus Act provided, that "when any persons had committed treason in any of the plantations, they were to be sent to such place there to receive such trial as might have been done before the Act." If, therefore, the objections of the prisoner's counsel were valid, the prisoners would be in the same situation as persons merely indicted, and, therefore, not entitled to their discharge. A course similar to this had been followed in *Res v. Kimberley*, (y), *Lundy's* case (z), *Res v. Platt* (a), *Re parte Krans*. (b.)

HILL, in reply, with reference to the last point, contended that if the return was bad, it was non-existent, and then no ground appeared for detaining the prisoners in custody.

Cur. adv. vult.

LORD ABINGER, C. B., on the 6th of May delivered the judgment of the Court.—This is a case of a habeas corpus to the gaoler of Liverpool, on the return to which a motion has been made to discharge the prisoners. The Court is bound to look at the substance of the return: if it contains sufficient matter in substance to show that the prisoner is lawfully detained, we cannot discharge him upon habeas corpus, though the return should in some respects be informal, or should go into matter not essential to the question. The return then in substance is, that by an Act of the legislature of Upper Canada, the lieutenant-governor, with the advice of the executive council of that province, was enabled to grant a pardon under the great seal, upon such terms as might appear proper, to such persons then under charge of high treason, committed in that province, as should petition the lieutenant-governor before their arraignment, praying for pardon; and that the same Act provides that in case any persons should be pardoned under that Act, upon condition of being transported or banishing himself from that province either for life or for any term of years, such person, if he should return to the province before the period of his transportation or banishment, should be guilty of felony, and liable to suffer death; that after the passing of that Act the prisoner was duly indicted at a special court of oyer and terminer, held by authority of another Act of

(u) 1 East, 306.
(v) 2 Roll. Rep. 157.
(w) Vaughan, 135.
(x) Cro. Car. 557.

(y) 2 Stra. 848.
(z) 2 Ventr. 314.
(a) Leach's Crown Law, 157.
(b) 1 B. & Cr. 258.

the same legislature, for the crime of high treason; that before his arraignment, in accordance with the Statute, the prisoner petitioned the lieutenant-governor, confessing his guilt of the treason charged against him, and praying that Her Majesty's pardon might be extended to him upon such conditions as the lieutenant-governor, by and with the advice of the executive council, should see fit: that the lieutenant-governor did, with the advice of the council, consent that Her Majesty's mercy should be extended to him upon condition that he should be transported and remain transported to Her Majesty's colony of Van Dieman's Land for the term of fourteen years next ensuing the date of his arrival at Van Dieman's Land, to which terms and conditions the prisoner assented, and therefore the lieutenant-governor did, by letters patent under the seal of the province, remit and release the prisoner from all and every punishment that might be inflicted upon him by reason of the said treason so confessed, upon the condition, nevertheless, that he should be and remain transported for the term aforesaid. The return then states, that there being no means of conveying the prisoner directly from Upper Canada to Van Dieman's Land, it became necessary to convey him first to Quebec, in Lower Canada, and then to England, for the purpose of transporting him to Van Dieman's Land, and that accordingly he was transmitted by authority of the lieutenant-governor of Upper Canada to Quebec, and thence, by authority of the executive government there, which issued letters patent in the name of Her Majesty to command that the prisoner should be delivered to *Digby Morton*, the master of the bark *Captain Ross*, to be by him conveyed to England, to such place as Her Majesty should think fit, to the end that he might thence be transported to Van Dieman's Land; that *Digby Morton* accordingly brought him to Liverpool, the same being the place which seemed fit to Her Majesty, and which was the most proper place for the purpose, and there delivered him to the gaoler of Liverpool, who detains him in his custody whilst means are preparing to transport him to Van Dieman's Land. This is the substance of the return, against which many ingenious objections have been urged, the principal of which seem to be, that the legislature of Upper Canada had no authority to make any such law; that if they had it could be binding only within the precincts of that province; that it could communicate no authority to any person out of that province, and therefore could give none to the gaoler of Liverpool; that even if it could have that effect, the pardon granted under that law being conditional, it was not competent to the prisoner to accept a pardon whereby he submitted himself to imprisonment or transportation, or that if it were competent to him to accept a pardon with such a condition, he has still a right to retract his consent, and to be set free from the obligation imposed upon him by the condition. All these topics have been elaborately argued on both sides, and have received due attention from the Court; but, in the view which we take of the case, we do not think it necessary to pronounce any opinion upon them. If the condition upon which alone the pardon was granted be void, the pardon must also be void. If the condition were lawful but the prisoner did not assent to it, nor submit to be transported, he cannot have the benefit of the pardon; or, if having assented to it, his assent be revocable, we must consider him to have retracted it by this application to be set at liberty, in which case he is equally unable to avail himself of the pardon. Looking then at the return, the position of the prisoner appears to be this, that he has been indicted for high treason committed in Canada against Her

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Majesty; that he has confessed himself guilty of that treason; that he is liable to be tried for it in England; that he cannot plead the pardon which he has renounced; and that he is now in the custody of the gaoler of Liverpool under such circumstances as would justify any subject of the Crown in England in taking and detaining him in custody till he be dealt with according to law. Any subject who held him in custody with a knowledge of these circumstances would be guilty of a crime in aiding and assisting his escape, if he be permitted to go at large without lawful authority. How then can we order the gaoler of Liverpool, or any other person who has him in custody with knowledge of these circumstances, to let him go at large? If the prisoner cannot be lawfully transported under his present circumstances, it is to be presumed that the government, upon being so certified, will not take proper measures for prosecuting him for the crime of treason in England. For these reasons we are of opinion that the prisoners must be remanded

The prisoners were remanded accordingly.

February 19.

Doe d. SIMON HISCOCKS v. JOHN HISCOCKS.

A testator by his will devised lands to his grandson "John H., eldest son of John H." (the testator's son). At the time of making the will *Simon*, the lessor of the plaintiff, was the eldest son of *John H.* by his first marriage, and *John H.*, the defendant, was the eldest son of *John H.* by his second marriage. Held, that the testator's instructions for his will, and his declarations subsequent to its execution, were not admissible in evidence to explain the will.

THIS was an action of ejectment, to try the title of the lessor of the plaintiff to certain lands in the county of Devon. At the trial before *Boonaguet*, J., at the Spring Assizes for that county, 1838, it appeared that *Simon Hiscocks*, under whom the plaintiff claimed the premises in question, and who was the grandfather of both the plaintiff and defendant, by his will, bearing date the 9th July, 1822, devised the premises in dispute to his son, *John Hiscocks*, to hold the same unto him, his said son, *John Hiscocks*, and his assigns, for and during the term of his natural life; and immediately on the demise of the said *John Hiscocks*, the testator gave and devised the said premises unto his grandson, *John Hiscocks*, eldest son of the said *John Hiscocks*, and his assigns, for and during his natural life; and immediately on his decease the testator gave and devised the same premises unto the first son of the body of his said body *John Hiscocks*, and the heirs male of his body lawfully issuing, with remainders over. At the time of making the will, *John Hiscocks*, the testator's son, had issue by a first marriage *Simon Hiscocks*, the lessor of the plaintiff, and by a second marriage *John Hiscocks*, the defendant, and several other younger children, sons and daughters. It appeared, also, that the estate had come to the testator from the father of *John Hiscocks*, the son's second wife. Hence it appeared that neither the plaintiff nor the defendant fully answered the description in the will, for the lessor of the plaintiff, the

The only case in which evidence of a testator's intention is admissible is where the meaning of his words is clear, and the will on the face of it is intelligible, but from some of the circumstances proved an ambiguity arises, which of two or more things or persons (each answering the words of the will) the testator intended to express.

But where the description in the will applies partially to two or more persons or things, evidence of the testator's intention in making his will is not admissible. The judge at the trial is to form his opinion from the surrounding facts to be found by the jury, and direct them accordingly, and where the facts do not enable him so to direct them, *semble*, that the devise is void for uncertainty.

eldest son of *John Hiscocks*, was named *Simon*, whilst *John Hiscocks*, the defendant, was the eldest son of *John Hiscocks* the elder, only by the second marriage. The plaintiff's counsel, therefore, proposed to put in evidence the testator's instructions in making his will, and also declarations made by him subsequently to the will, to shew that the plaintiff was intended by him to be the object of his bounty. The defendant's counsel objected to this evidence, but the learned judge received it, reserving leave to the defendant to move to enter a non-suit, if the Court should think that, under the circumstances, it was not admissible. Evidence of the same kind was given on both sides, and the plaintiff had a verdict.

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Cole having in Easter Term obtained a rule to shew cause why there should not be a non-suit or new trial, on the ground of the inadmissibility of this evidence, in Michaelmas Term, 1838,

Crowder and *Bere* shewed cause, and contended that this was a case of *ambiguitas latens*, which did not arise until the circumstances of the family were made known, and until it had been rendered manifest that the testator had mistaken the name of the intended object of his bounty; that the case, therefore, came within the known principle of law, that where no uncertainty appeared on the face of the will, extrinsic evidence might be used to cure a latent ambiguity, and they cited the following cases: *Cheyney's case* (a), *Counden v. Clarke* (b), *Jones v. Newman* (c), *Day v. Trigg* (d), *Beaumont v. Fell* (e), *Hampshire v. Pierce* (f), *Dowset v. Sweet* (g), *Bradwin v. Harpur* (h), *Thomas v. Thomas* (i), *Price v. Page* (k), *Smith v. Coney* (l), *Careless v. Careless* (m), *Doe d. Chichester v. Osenden* (n), *Goodtitle v. Southern* (o), *Doe d. Le Chevalier v. Huthwaite* (p), *Doe d. Morgan v. Morgan* (q), *Richardson v. Watson* (r), *Miller v. Travers* (s), *Doe d. Gord v. Needs* (t).

Erle and *Butt*, contra, maintained that all the words of the will became intelligible as soon as the circumstances of the family were shewn, that after proof of that kind had been given, the judge ought to have applied it to the case, and was wrong in receiving further evidence of the declarations of the testator, that after the state of the family had been shewn the words of the will, "eldest son of the said *John Hiscocks*," could refer only to the eldest son by the second marriage, and that the judge ought to have drawn that inference. In support of these positions they cited *Steede v. Berner* (u), *Foster v. Ramsay* (v), *Wilkinson v. Adam* (w), *Beachcroft v. Beachcroft* (x), *Gill v.*

- (a) 5 Rep. 68.
- (b) Hob. 32.
- (c) 1 W. Black. 60.
- (d) 1 P. Wms. 286.
- (e) 2 P. Wms. 141.
- (f) 2 Ves. Sen. 216.
- (g) Ambl. 175.
- (h) Ambl. 374.
- (i) 6 T. Rep. 671.
- (k) 4 Ves. 680.
- (l) 6 Ves. 42.
- (m) 19 Ves. 604; 1 Meriv. 384.
- (n) 3 Taunt. 147.

- (o) 1 M. & Sel. 299.
- (p) 3 B. & Ald. 632.
- (q) 1 C. & Mea. 235.
- (r) 4 B. & Ad. 787; 1 Nev. & M. 567.
- (s) 8 Bing. 244; 1 M. & Scott, 342.
- (t) 2 M. & Wel. 129.
- (u) 1 Free, 292.
- (v) 8 Vin. Abr. 310, pl. 9; 2 Tid. 149.
- (w) 1 Ves. & Bea. 422.
- (x) 1 Madd. 430.

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Shelley (y), Fraser v. Pigott (z), Lewis v. Lewellin (a), Davies v. Williams (b). They then contended, that as the testator's intention on the face of the will was clear and unequivocal, no evidence of a contradictory intention ought to have been received, and that if the facts connected with the case shewed the will to be incapable of application the devise was void on the ground of uncertainty, *Parsons v. Parsons (c), Baylis v. Attorney General (d), Herbert v. Reid (e).* That, at all events, the judge ought not to have received declarations of the testator uttered subsequently to the making of the will, *Doe d. Morgan v. Morgan (f), Harris v. Bishop of Lincoln (g), Rushfield v. Careless (h).*

In Trinity Term, 1839, Lord ABINGER, C.B., delivered the judgment of the Court.—This was an action of ejectment, brought on the demise of *Simon Hiscocks* against *John Hiscocks*. The question turned on the words of a devise in the will of *Simon Hiscocks*, the grandfather of the lessor of the plaintiff, and of the defendant. By his will, *Simon Hiscocks*, after devising estates to his son *Simon* for life, and from and after his death to his grandson, *Henry Hiscocks*, in tail male, and making as to certain other estates an exactly similar provision in favour of his son *John* for life; then, after his death, the testator devises those estates to "my grandson, *John Hiscocks*, eldest son of the said *John Hiscocks*." It is on this devise that the question wholly turns.

In fact, *John Hiscocks*, the father, had been twice married. By his first wife he had *Simon*, the lessor of the plaintiff, his eldest son; the eldest son of the second marriage was *John Hiscocks*, the defendant. The devise, therefore, does not, both by name and description, apply to either the lessor of the plaintiff, who is the eldest son, but whose name is *Simon*, nor to the defendant, who, though his name is *John*, is not the eldest son.

The cause was tried before Mr. Justice *Bosanquet*, at the Spring Assizes for the county of Devon, 1838, and that learned judge admitted evidence of the instructions of the testator for the will, and of his declarations after the will was made, in order to explain the ambiguity in the devise, arising from this state of facts; and the verdict having been found for the lessor of the plaintiff, a rule has been obtained for a non-suit, or new trial, on the ground that such evidence of intention was not receivable in this case. And after fully considering the question, which was very well argued on both sides, we think that there ought to be a new trial.

It must be admitted, that it is not possible altogether to reconcile the different cases that have been decided on this subject, which makes it the more expedient to investigate the principles upon which any evidence to explain the will of a testator ought to be received. The object in all cases is to discover the intention of the testator. The first and most obvious mode of doing this is to read his will as he has written it, and collect his intention from his words. But as his words refer to facts and circumstances respecting his property and

- (y) 2 Russ. & M. 336.
 (z) 1 Younge, 354.
 (a) 1 Turn. & Russ. 104.
 (b) 1 Ad. & Ell. 588, 3; Nev. & M.
 821.
 (c) 1 Ves. Jun. 266, n.

- (d) 2 Atk. 239.
 (e) 16 Ves. 489.
 (f) 1 C. & M. 235.
 (g) 2 P. Wms. 135.
 (h) Id. 158.

his family, and others whom he names or describes in his will, it is evident that the meaning and application of his words cannot be ascertained without evidence of all those facts and circumstances. To understand the meaning of any writer, we must first be apprised of the persons and circumstances that are the subject of his allusions or statements; and if these are not fully disclosed in his work, we must look for illustration to the history of the times in which he wrote, and to the works of contemporaneous authors. All the facts and circumstances, therefore, respecting persons or property to which the will relates, are undoubtedly legitimate, and often necessary evidence, to enable us to understand the meaning and application of his words.

Again, the testator may have habitually called certain persons or things by peculiar names, by which they were not commonly known. If these names should occur in his will they could only be explained and construed by the aid of evidence, to shew the sense in which he used them, in like manner as if his will were written in cypher, or in a foreign language. The habits of the testator in these particulars must be receivable as evidence to explain the meaning of his will.

But there is another mode of obtaining the intention of the testator, which is by evidence of his declarations of the instructions given for his will, and other circumstances of the like nature, which are not adduced for explaining the words or meaning of the will, but either to supply some deficiency, or remove some obscurity, or to give some effect to expressions that are unmeaning or ambiguous.

Now, there is but one case, in which it appears to us that this sort of evidence of intention can properly be admitted, and that is, where the meaning of the testator's words is neither ambiguous nor obscure, and where the devise is on the face of it perfect and intelligible, but, from some of the circumstances admitted in proof, an ambiguity arises as to which of the two or more things, or which of the two or more persons (each answering the words in the will) the testator intended to express.

Thus, if a testator devise his manor of S. to A. B., and had two manors of North S. and South S., it being clear he means to devise one only, whereas both are equally denoted by the words he has used, in that case there is what Lord Bacon calls "an equivocation," i. e. the words equally apply to either manor, and evidence of previous intention may be received to solve this latent ambiguity; for the intention shews what he meant to do; and when you know that you immediately perceive that he has done it by the general words he has used, which, in their ordinary sense, may properly bear that construction.

It appears to us that, in all other cases, parol evidence of what was the testator's intention ought to be excluded, upon this plain ground, that his will ought to be made in writing; and if his intention cannot be made to appear by the writing explained by circumstances, there is no will.

It must be owned, however, that there are decided cases which are not to be reconciled with this distinction in a manner altogether satisfactory. Some of them, indeed, exhibit but an apparent inconsistency. Thus, for example, in the cases of *Doe v. Huthwaite*, and *Bradshaw v. Bradshaw*, the only thing decided was, that in a case like the present some parol evidence was admissible. There, however, it was not decided that evidence of the testator's intention ought to be received. The decisions, when duly considered, amount to no more than this, that where the words of the devise, in their primary sense,

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when applied to the circumstances of the family, and the property, make the devise insensible, collateral facts may be resorted to, in order to show that in some secondary sense of the words—and one in which the testator meant to use them—the devise may have a full effect. Thus again, in *Cheyney's* case, and in *Counden v. Clarke*, “the averment is taken,” in order to shew which of two persons, both equally described within the words of the will, was intended by the testator to take the estate, and the late cases of *Doe d. Morgan v. Morgan*, and *Doe d. Gord v. Needs*, both in this Court, are to the same effect. So in the case of *Jones v. Newman*, according to the view the Court took of the facts, the case may be referred to the same principles as the former. The Court seem to have thought the proof equivalent only to proof of there being two *J. C.'s*, strangers to each other, and then the decision was right, it being a mere case of what Lord *Bacon* calls equivocation.

The cases of *Price v. Page*, *Still v. Hosts* (i), and *Careless v. Careless*, do not materially vary in principle from those last cited. They differ, indeed, in this, that the equivocal description is not entirely accurate; but they agree in its being (although inaccurate) equally applicable to each claimant; and they all concur in this, that the inaccurate part of the description is either as in *Price v. Page*, a mere blank, or, as in the other two cases, applicable to no person at all. These, therefore, may fairly be classed also as cases of equivocation; and in that case evidence of the intention of the testator seems to be receivable. But there are other cases not so easily explained, and which seem at variance with the true principles of evidence. In *Selwood v. Mildmay* (k), evidence of instructions for the will was received. That case was doubted in *Miller v. Travers*; but, perhaps, having been put by the Master of the Rolls as one analogous to that of the devise of all a testator's freehold houses in a given place, where the testator had only leasehold houses, it may, as suggested by Lord Chief Justice *Tindal*, in *Miller v. Travers*, be considered as being only a wrong application to the facts of a correct principle of law. Again, in *Hampshire v. Pearce*, Sir *John Strange* admitted declarations of the intentions of the testatrix to be given in evidence, to shew that by the words “the four children of my niece *Bamfield*,” she meant the four children by the second marriage. It may well be doubted whether this was right, but the decision on the whole case was undoubtedly correct; for the circumstances of the family, and their ages, which no doubt were admissible, were quite sufficient to have sustained the judgment, without the questionable evidence. And it may be further observed, that the principle with which Sir *J. Strange* is said to have commenced his judgment, is stated in terms much too large, and is so far inconsistent with later authorities. *Beaumont v. Fell*, though somewhat doubtful, can be reconciled with true principles, upon this ground, that there was no such person as *Catherine Earnley*, and that the testator was accustomed to address *Gertrude Yardley* by the name of *Gatty*. This, and other circumstances of the like nature, which were clearly admissible, may, perhaps, be considered to warrant that decision; but there the evidence of the testator's declarations as to his intention of providing for *Gertrude Yardley* was also received; and the same evidence was received at Nisi Prius, in *Thomas v. Thomas*, and approved on a motion for a new trial by the dicta of Lord *Kenyon* and Mr. Justice *Lawrence*. But these cases seem to us at variance with the deci-

(i) Madd. 192.

(k) 3 Ves. Jun. 306.

sion in *Miller v. Travers*, which is a decision entitled to great weight. If evidence of intention could be allowed for the purpose of shewing that by *Catherine Earnley* and *Mary Thomas* the respective testators meant *Gertrude Yardley* and *Elinor Evans*, it might surely equally be adduced to prove that by the county of Limerick a testator meant the county of Clare. Yet this was rejected, and we think rightly. We are prepared on this point (the point in judgment in the case of *Miller v. Travers*) to adhere to the authority of that case. Upon the whole, then, we are of opinion that in this case, there must be a new trial.

Where the description is partly true as to both claimants, and no case of equivocation arises, what is to be done is to determine whether the description means the lessor of the plaintiff or the defendant. The description, in fact, applies partially to each, and it is not easy to see how the difficulty can be solved. If it were *res integra* we should be much disposed to hold the devise void for uncertainty; but the cases of *Doe v. Huthwaite*, *Bradshaw v. Bradshaw*, and others, are authorities against this conclusion. If, therefore, by looking at the surrounding facts to be found by the jury, the Court can clearly see, with the knowledge which arises from those facts alone, that the testator meant either the lessor of the plaintiff or the defendant, it may so decide, and direct the jury accordingly; but we think that for this purpose they cannot receive declarations of the testator of what he intended to do in making his will. If the evidence does not enable the Court to give such a direction to the jury, the defendant will, indeed, for the present succeed; but the claim of the heir at law will probably prevail ultimately, on the ground that the devise is void for uncertainty.

Rule absolute for a new trial.

KNIGHT and others, assignees of BARROW, an Insolvent, v. FERGUSON.

ASSUMPSIT for money had and received to the use of the plaintiffs as assignees. Plea non-assumpsit. At the trial, before Lord Abinger, C.B., at the Berkshire Summer Assizes, 1838, the following facts were proved. The insolvent was a publican, living at Bracknell, in Berkshire.

At the close of the year 1836 he became embarrassed, and in November and December several executions for sums amounting to 256*l.* 12*s.* 6*d.* were put into his house; one for 51*l.* 10*s.* 3*d.* being at the suit of the defendant *Ferguson*. Besides this the insolvent owed rent to his landlady, and taxes to the Crown, and his goods if sold would have been insufficient to cover the amount of his debts. Under these circumstances *Barrow*, on the 8th Decem-

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An insolvent having several executions in his house, at the suggestion of the defendant, who was one of his creditors, executed an assignment to him of all his effects for the benefit of such creditors as

should come in and sign the deed. The deed recited that the insolvent "had proposed" the assignment. The execution creditors were accordingly paid their claims, and the defendant taking possession of the goods and premises, carried on the business for some time, when he sold the whole concern for a larger amount than it would have realized if it had been disposed of by the sheriff. The deed was signed by several of the execution creditors. The insolvent, within three months from the assignment went to prison, and afterwards obtained his discharge under the Insolvent Act. Held, that this deed was not voluntary within the meaning of the 7 Geo. 4, c. 57, s. 32, and that the defendant was not estopped by the recital in the deed of assignment from contending that the deed was not voluntary.

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ber, 1836, at the plaintiff's suggestion, executed an assignment of all his property to the defendant and Mrs. Long in trust for the benefit of all the creditors who should come in and sign the deed. The deed recited that *Barrow* "had proposed" to make the assignment for the benefit of the creditors. The sheriff's officer continued in possession under the executions until the 12th December, when the assignees under the deed paid him the amount of his levies, and he withdrew from possession; he afterwards paid over the money to the execution creditors, several of whom had signed the deed. *Barrow* went to prison on the 24th January, presented his petition to the Insolvent Debtors' Court on the 11th March, and was discharged on the 20th June; and the plaintiffs were duly appointed his assignees. The defendant and the other assignee carried on for some time the business of the house under the assignment. The goods were ultimately sold for the sum of 445*l.* 5*s.* 6*d.*, and it was contended by the plaintiffs that the defendants were chargeable with other sums received as the profits of the public house. The plaintiffs claimed in the whole the sum of 590*l.*

Under these circumstances the learned Judge was of opinion that the deed of assignment was not voluntary within the meaning of the Insolvent Debtors' Act, 7 Geo. 4, c. 57, s. 32; but he offered to leave the question to the jury if the plaintiffs' counsel required him to do so. This offer was declined by the plaintiffs' counsel, whereupon the jury, under his Lordship's direction, found a verdict for the defendant, leave being reserved to the plaintiffs to move to enter a verdict for them for such an amount as should be determined by an arbitration agreed on by both parties.

Talfourd, Serjt., having in Michaelmas Term obtained a rule nisi accordingly.

Ludlow, Serjt., and *Tyrvohitt*, shewed caused cause. This rule must be discharged. This is an assignment of the insolvent's effects for the benefit of all his creditors, and therefore, according to *Davies v. Acocks* (a), not fraudulently void.—[*Alderson*, B.—The case of *Bians v. Towsey* (b), appears opposed to that decision.]—That case may be distinguished, as it proceeded on the ground that the assignment was made after the imprisonment and without any new consideration. Here the consideration was the release of the insolvent's goods from the pressure of creditors, and their agreement to give him a discharge if he would make a part payment to them of his debts. This is a sufficient consideration, *Doe d. Watson v. Routledge* (c). This was not a voluntary assignment, being made under the pressure of executions, and with a view to obtain a release from them, and made on the suggestion of a creditor. This is not a spontaneous conveyance executed, and no motive by the insolvent, but originates in the *bond fide* requests of the creditors, and is therefore not voluntary within the meaning of the Act. *Arnell v. Bean* (d), *Doe d. Boydell v. Gillett* (e), *Mogg v. Baker* (f). The parties are not precluded by the recital in the deed from shewing with whom the proposal to execute the assignment originated.

(a) 2 C. M. & R. 461.
 (b) 7 A. & Ell. 869.
 (c) Comp. 705.

(d) 8 Bing. 87.
 (e) 2 C. M. & R. 579.
 (f) 4 M. & W. 348.

Talfourd, Serjt., and *W. J. Alexander*, and *Bros.*—The question is whether this is a voluntary conveyance. It is opposed to the policy of the law, and amounts to a fraudulent preference of those creditors who sign it over those who do not. *Binas v. Twiss*, is opposed to *Davis v. Acocks*. In *Doe v. Gillett* and *Mogg v. Baker* the creditor demanded the execution of the assignment. Here the recital in the deed states that the debtor himself proposed it. The release of the debts by the creditors cannot be said to be a new consideration: it is nothing more than a receipt in full from one creditor; it is the necessary result of the discharge which has been given. They referred to the case of *Becke v. Smith (g)*.

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In Trinity Term last Lord ABINGER delivered the judgment of the Court.—This was an action tried before me at the last Summer Assizes at Abingdon.

The insolvent, *John Barrow*, kept a public house at Bracknell. He went to prison on the 24th January, 1837, presented his petition on the 11th of March, and was discharged on the 20th of June. The plaintiffs were duly appointed his assignees. The claim of the plaintiffs was for a sum of 590*l.* as it was said; but this was supported only upon the admission of an account, by which it appeared that the defendant had, on the 14th of April, 1837, received on a sale of *Barrow's* goods the sum of 448*l.* 5*s.* 6*d.*, but it was said that he was chargeable for further sums received as profit in the trade of the house for some months before; and it was agreed that if the plaintiffs were entitled to a verdict the amount should be referred.

The defence was, that the defendant and a lady of the name of *Long* were the owners of the goods, under an assignment made by the insolvent on the 8th of December, 1836. It was stated by Serjeant *Ludlow* that the insolvent had several executions in his house, which had been brought in between the middle of November and the 8th of December, under which his goods had been seized, and were then in the hands of the sheriff; that there was also rent due to the landlord and taxes to the Crown, and that had his goods been sold by the sheriff there would not have been sufficient to satisfy the creditors who had their executions; whereupon it was suggested by the defendants, one of whom was the landlady, and the other one of the principal of the execution creditors, that if *Barrow* would assign over the property to them for the benefit of all the creditors, they would pay off the execution creditors and prevent the sale of the goods, to a great loss, by the sheriff, and would keep on the public house till the time came for renewing the licences, when the whole concern might be sold together to some advantage, and this was accordingly done, and the money sought to be recovered was the result of that arrangement, under which the defendant and his co-assignee had actually paid the execution creditors and saved the insolvent's estate from immediate ruin. To prove this case the learned Serjeant commenced by putting in the deed, the execution of which was admitted. Upon the deed being read it appeared on the recital that the assignment was proposed by *Barrow*. Upon this Serjeant *Talfourd* objected to the defendant's proceeding any further. He said that the deed, stating the proposal to come from *Barrow*, not only proved that it was a voluntary assignment, but that it estopped the defendants from shewing the contrary; therefore, the deed being voluntary, and within three months of the imprison-

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ment of *Barrow*, was fraudulent and void within the 32d section of the Insolvent Debtors' Act. I was of opinion that the defendant was not estopped by the recital of the deed from shewing the real facts of the case, but saved that point for Serjeant *Talfourd*, upon which Serjeant *Ludlow* proceeded to call *Thomas Goodchild*, a sheriff's officer, who proved that he had served executions, one of which was at the suit of the defendant *Fergusson*, for 511. 10s. 3d., and that the whole amounted to 256l. 12s. 6d., that he was in the possession of the insolvent's goods till the 12th of December, when the assignees, that is, the defendant and the landlady, paid him the full amount, which was afterwards paid to the several creditors, some of whom, besides *Fergusson* the assignee, had signed the deed. The sheriff's officer, when he received the money on the 12th, had notice not to pay it over to the parties. At this part of the case I intimated my opinion to Serjeant *Talfourd* that I did not think the jury, as the case then stood, could find this deed fraudulent under the clause in the Insolvent Debtors' Act he had referred to, as the circumstances spoke for themselves and shewed that the deed was a measure submitted to by him in order to prevent the sale of his goods, which was otherwise inevitable, and that there could not be a greater pressure upon a man than the pressure of five or six executions in his house, which if levied must effect his immediate ruin. I, however, stated that this was a question for the jury, and that if the Serjeant pleased the case should go on, and he might go to the jury upon it. The Serjeant then said, that after that intimation of my opinion he would not go to the jury, but would rest upon his first objection.

The case here stopped, and the jury, by my direction, found for the defendant.

In using the word "fraud" in my note, I must desire to state, that it was used with reference to the language of the statute, and that it meant, in that sense, no more than voluntariness. It is true, however, that I expressed my opinion that there was no other fraud, and that the deed was meritorious on all sides, as it gave to the other creditors a chance of some surplus, out of which they might have a dividend, of which there was no chance if the goods had been sold by the sheriff. This more clearly appears from the account put in evidence by the plaintiff, which I have since desired should be sent to me, and which shews that the goods when sold on the 13th of April, to a purchaser, who took the premises on a valuation, were valued only at 369l. Now, when it is considered that the executions amounted to 256l. 12s. 9d., besides the taxes and the rent, it cannot be doubted that the sale by the sheriff would not have realized the amount of the charges then on the goods.

I am also of opinion that the deed of assignment was upon a consideration paid by the defendant and his co-assignee. It is true it is not mentioned in the deed that they are to pay the sheriff, but it is manifest that they could not have the goods without paying him, and that it was the necessary consequence of the arrangement, and plain understanding of all parties, that they were to pay him. Moreover, the defendant, *Fergusson*, and such of the execution creditors as signed the deed, as well as the landlady, must be considered as waiving their full rights and coming in *pro rata* with the other creditors. In either of these views they gave a consideration for the assignment. It is clear that the defendant might have taken an assignment from the sheriff of all the goods seized, upon paying him the sum of 256l. 12s. 9d. together with the rent and taxes due. It could not have made the assignment less valid if he had made

a declaration of trust that he would hold the goods for the benefit of all such creditors as chose to come *pari passu* for dividends on their debts after paying himself his advances to the sheriff. Now what is this deed but the same transaction in substance in another form?

I therefore retain my opinion that the deed was not voluntary, and therefore not fraudulent within the Statute for the Relief of Insolvents; and moreover, that it was a deed for a valuable consideration paid by the defendant and his co-assignee, and that the rule should be discharged.

The rest of the Court expressed their concurrence, and the rule was discharged.

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WESTON and others v. WOODCOCK and others.

COWLING had obtained a rule to shew cause why the order of *Mauls*, B., for striking out one of two counts in the declaration in this cause should not be rescinded. The action was in case, and the first count stated, that by a certain indenture, made in the lifetime of one *Newton*, the plaintiffs and *Newton* had demised to *J. F. Taylor* a certain building or factory, situate, &c., and then used as a cotton factory, and then in the possession and occupation of *J. F. T.*, and the warehouse, counting-house, and engine-house, lodges, reservoirs of water, &c., and all implements, tackle, &c., the property of the lessors to the factory, and steam-engine belonging, to hold from the 12th of *May* then next for seven years. It then set out a covenant by *J. F. T.* to keep up a good steam-engine of beaten iron (of certain dimensions), and to deliver up the premises in good order, with every thing upon them, at the end of the term. There was also a covenant that the tenancy should become void upon the bankruptcy of *J. F. T.* The declaration then stated an entry by *J. F. T.*, and his continuance in possession till the term was determined by his bankruptcy. It then averred that at the time of the determination of the term "a certain steam-engine boiler theretofore annexed to, set up and placed on the demised premises by *J. F. T.*, remained and continued annexed and set up and placed after the making of the indenture, and during the term, and was used for working the steam-engine, and was proper and necessary for working the steam engine, and at the time of the determination of the term was the only one capable of supplying the engine with steam," and that by reason of the premises the plaintiff had become entitled to the steam-boiler, and the same ought to have remained and been continued and left on the premises, and not disannexed or removed without the licence and consent of the plaintiffs and *Newton*. *Breach*—That the defendants wrongfully and without the licence of the plaintiffs, and against their will, disannexed and removed the steam-engine boiler, and converted and disposed of the same to their own use, whereby the estate and interest of the plaintiffs in the factory was greatly injured, &c.

The first count of a declaration in case stated a demise by the plaintiffs of a factory, with steam-engine boiler, and alleged as a breach that the defendants had disannexed and removed the boiler, and converted it to their own use, to the injury of the plaintiff's reversion. The second count was in trover. *Semble*, that both counts were not allowable.

The second count was in trover for the conversion of the steam-engine boiler

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Crompton shewed cause.—These counts are in direct violation of the 5th rule of H. T. 4 W. 4, which forbids the use of several counts unless a distinct subject-matter of complaint is intended to be established in respect of each. Here the first count is in substance the same as the count in trover. This is not an action for any injury to the reversionary estate of the plaintiffs, but for removing and converting the boiler; and as there was but one boiler on the premises, each count must be in respect of the same specific article. The whole cause of complaint in the second count, and something more may be given in evidence under the first count.

The Court then called upon

Cowling, in support of the rule.—The question is not whether the boiler mentioned in both counts is the same, but whether the new rules prevent the plaintiffs from stating their grievance in two different modes, though it respects the same chattel and the same transaction. In *Tidd's New Practice*, p. 218, it is said, "Although there has been *one transaction* between the parties, yet there may have been *several causes of action* arising out of it, which may be the subject of several counts. Thus in an action on the case against the sheriff, one count may be inserted in the declaration for not taking the defendant when he had an opportunity, and another for suffering him to escape; for there might have been a time when the sheriff might have made the arrest, and had not done so, or he might have arrested the party, and afterwards have permitted him to escape." The restriction to one count was introduced in consequence of the power of amendment given by the 3 & 4 W. 4, c. 42, s. 23. If, therefore, the declaration contained but one count, and the evidence was applicable to the other only, could the judge at *nisi prius* amend the declaration by substituting the one count for the other? It is submitted that he could not. In *Hitchman v. Walton* (A), the first count was for removing and destroying fixtures, and converting them; and the second count was in trover for the conversion of the same fixtures; and the plaintiff retained his verdict on both counts. [*Maule*, B.—In that case the fixtures in the second count might have been different from those in the first. It does not appear that the counts were objected to.] So also two counts in trover by assignees, one on the possession of the bankrupt, and the other on the possession of the assignees, are constantly allowed, although the goods are the same, and there has been but one conversion. Here the first count is for the removal of the boiler, to the prejudice of the plaintiff's reversion, and the second is for the conversion alone. [*Parke*, B.—Then why not strike out the latter part of the first count, which alleges a conversion, and leave the second count as it at present stands? If the plaintiffs rely upon a conversion after the boiler was severed from the freehold, the measure of damages would be different.]

Cowling assented to the suggestion of the Court.

(A) 4 M. & W. 409; 1 Horn & Hurl. 374.

WALLIS v. HARRISON.

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CASE for injury to the plaintiff's reversionary interest in certain land in the occupation of his tenant. The defendant pleaded that the reversion of and in the said close or parcel of land with the appurtenances did not, at the said time when, &c., and still does not, belong to the plaintiff, *modo et forma*. At the trial, before Alderson, B., at the last assizes for the county of Durham, it appeared that the land in question had been demised by the dean and chapter of Durham to the plaintiff and his wife for twenty-one years, renewable every seven years, upon payment of a fine. The plaintiff had granted a lease to the tenant in possession. It was objected, that the action was improperly brought by the plaintiff alone, and that his wife should have joined. The learned judge overruled the objection, and the plaintiff obtained a verdict, his lordship having reserved leave to the defendant to move to enter a nonsuit, if the Court should be of opinion that the wife ought to have been joined in the action.

Lands were demised to A. and his wife for twenty-one years, renewable upon payment of a fine. A. demised to the tenant in possession:—Held, that A. might sue alone for an injury to the reversion, and that even if it were necessary to join the wife, the objection could only be taken by plea in abatement.

Alexander now moved accordingly, and cited *Roper* on the *Law of Husband and Wife* (a), and Co. Lit. 46, b, where it is said, "If a man be possessed of a term of forty years in right of his wife, and makes a lease for twenty years, reserving rent, and dies, the wife shall have the residue of the term; but the executors of the husband shall have the rent, for that it was not incident to the reversion, for that the wife was not a party to the lease."

Cur. adv. vult.

LORD ABINGER, C. B.—We have considered this case, and have come to the conclusion, that there is no ground for the objection that the wife ought to have joined in the action; and we are also of opinion that if the objection were valid, it should have been taken by plea in abatement.

Rule refused.

(a) Vol. 1, p. 173.

BROWNING and another v. PARIS and another, Executors of WILLIAM REID, deceased.

ASSUMPSIT for work and labour, goods sold, and for money due on an account stated. *Plea*—*Actio non accrevit infra sex annos*. *Replication*—That William Reid, after the making of the said several promises in the said declaration mentioned, was actually a prisoner in the custody of the marshal of the marshalsea of his late Majesty King George the Third, in the King's Bench prison in the county of Surrey, at the suit of the plaintiffs and others, his creditors, on the 5th of June, A. D. 1812, mentioned in a certain act made

Though the Insolvent Act, 52 Geo. 3, c. 164, s. 54, reserves to creditors a right of payment out of the future effects of an insolvent,

yet it does not prevent the operation of the statute of limitations.

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at the parliament of his said late Majesty, holden at *Westminster* in the county of *Middlesex*, in the 52nd year of his reign, intituled "An Act for the Relief of certain Insolvent Debtors in *England*," and that afterwards, to wit, at the general quarter sessions of the peace of his said late Majesty King *George* the Third, holden at the *Sessions House, Horsemonger Lane*, in the parish of *Saint Mary, Newington*, in the said county of *Surrey*, the said *William Reid* applied to be discharged and examined under the said act. And his said late Majesty's justices of the peace at that sessions assembled did at such session adjudge the said *William Reid* to be entitled to the benefit of the said act, and did order the said marshal of the marshalsea of his said late Majesty to set at liberty the said *William Reid*. That afterwards, and after the death of the said *William Reid*, and within six years next before the commencement of this suit, to wit, on, &c., divers goods and chattels of great value, to wit, of the value of the damages sustained by them, the plaintiffs, by reason of the non-performance of the promises in the said declaration mentioned (the said goods and chattels not being or having been any part of the necessary apparel, bedding, or tools of the said *William Reid*, deceased, but which said goods and chattels were and are part of the future estate and effects of the said *William Reid*, within the true intent and meaning of the statute aforesaid), came to the hands of the defendants as executors as aforesaid to be administered, which said goods and chattels were and are the first and only part of the future estate of the said *William Reid* which ever came to the hands of the defendants as executors as aforesaid to be administered within the meaning of the aforesaid statute.—*Verification.*

Special demurrer, assigning for cause that the replication confesses the matters alleged in the said plea, yet does not avoid the same, and also that it does not allege that *Reid* in his lifetime, and after he was adjudged entitled to the benefit of the said act, had not any future estate or effects, and that the said statute did not save the causes of action in the declaration mentioned from the effect of the statute of limitations.

Martin, in support of the demurrer.—The 52 *Geo.* 3 (which was in force at the time the insolvent was discharged) does not prevent the operation of the statute of limitations. By the 54th section of that act, a right is reserved to the creditors of obtaining payment out of the future assets, but that provision does not prevent the debt from being barred by lapse of time. That is evident from the 57th section of the 7 *Geo.* 4, c. 57, which was expressly framed to remedy the previous defective state of the law. That section requires that before adjudication every prisoner shall execute a warrant of attorney authorizing the entering up of a judgment in one of the superior courts at *Westminster*, in the name of the assignee, for the amount of the debts stated in the schedule, "and if at any time it shall appear to the satisfaction of the Court that such prisoner is of ability to pay such debts or any part thereof, or that he or she is dead, leaving assets for that purpose, the said Court may permit execution to be taken out upon such judgment for such sum of money, as, under the circumstances of the case, the said Court shall order such sum to be distributed rateably amongst the creditors of such prisoner according to the mode thereinbefore directed, in case of a dividend made after adjudication; and such further proceedings shall and may be had upon such judgment as may seem fit to the discretion of the Court from time to time, until the whole of the debts due to

the several persons against whom such discharge shall have been obtained shall be fully paid and satisfied, together with such costs as the said Court shall think fit to award; and no *scire facias* shall be necessary to revive such judgment on account of any lapse of time, but execution shall at all times issue thereon by virtue of the order of the said Court." *Barton v. Tattersall* (a), which may be relied on, proceeded upon the established rule in equity that the statute of limitations does not take effect where there is a trust-fund. The replication is also bad on the ground that it does not allege that *Reid* in his lifetime, and after he was adjudged entitled to the benefit of the act, had not any estate or effects out of which the plaintiffs would be entitled to recover.

Jervis, in support of the replication.—The statute of limitations did not run against the claim of the plaintiff. The 52 *Geo. 3*, c. 165, protects the person of the debtor, but his future property is liable to answer the demands of his creditors. The replication shows that property came to the hands of the executors, and the plaintiffs would have a reasonable time after their knowledge of that to bring their action. *Higgins v. Scott* (b) shows that the statute of limitations bars the remedy only, and not the debt. Therefore, as the 52 *Geo. 3* makes the insolvent's future property liable, a new promise would arise from the executors on the goods coming to their hands.

Per Curiam.—The replication is no answer to the statute of limitations. Even supposing that, under the circumstances, a new promise arose, it would be a promise by the executors, whereas the plaintiff has declared on a promise by the testator.

Judgment for the defendant.

(a) 1 *Rus. & Mylne*, 237.

(b) 2 *B. & Adol.* 413.

EVANS v. JONES.

ASSUMPSIT. The declaration stated, That before and at the time of the making of the promise of the defendant thereafter mentioned, one *Thomas Williams*, Esq., had gone and been taken in custody, to wit, from *Carnarvon* to *London*, and had been arraigned and indicted on a charge of having feloniously uttered a certain forged will and testament, and two forged codicils; and the said *Thomas Williams* was, at the time of making the said promise of the defendant, on his trial at a general session of Oyer and Terminer of our lady the Queen, holden for the jurisdiction of the Central Criminal Court at Justice Hall in the *Old Bailey*, in the city of *London*; and the said *Thomas Williams* was then also charged with and indicted for feloniously forging a certain will and testament, and also charged with and indicted for feloniously forging a certain codicil; on which last-mentioned charges and indictments the said *Thomas Williams* was about to be tried by the country at the said session of Oyer and Terminer; and thereupon, to wit, on the 10th day of *April*, 1838, a certain discourse arose between the plaintiff and the defendant with reference to the said *Thomas Williams* and the said charges and accusations against him; and thereupon, afterwards, to wit, on the day and year aforesaid, in consideration

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that the plaintiff, at the request, had then promised the defendant to pay him one shilling, if the said *Thomas Williams* should not ever return to *Carnarvon*, but should be transported; he, the defendant, promised the plaintiff to pay him 10*l.*, if the said *Thomas Williams* should not be transported, and should return to *Carnarvon*. And the plaintiff in fact saith, that after the making of the said promise of the plaintiff and of the defendant, to wit, on the day and year last aforesaid, the said *Thomas Williams* was, at the said session of Oyer and Terminer, by jurors in that behalf respectively duly impaneled, returned and sworn, found not guilty of the said matters and offences so charged upon him as aforesaid, or any of them, and was then duly acquitted and discharged of the said premises, as by the record thereof remaining in the said Central Criminal Court more fully appears; and the plaintiff saith, that the said *Thomas Williams* was not then or at any other time transported or sentenced so to be, on account of the said charges or any of them, or of any other matter or cause; and that he the said *Thomas Williams* did, after the making of the said promise of the defendant, and before the commencement of this suit, to wit, on the first of *May*, 1838, return to *Carnarvon* aforesaid; of all which the defendant afterwards, to wit, on &c., had notice, and was then requested by the plaintiff to pay him the said sum of 10*l.*, according to the said defendant's promise; and the said plaintiff saith, that although afterwards, and after the said notice and request, a reasonable time for the defendant to pay the said sum of 10*l.* elapsed before the commencement of this suit, yet, &c. [Breach in non-payment of that sum.]

General demurrer, and joinder in demurrer.

Cowling, in support of the demurrer.—The declaration is bad, being founded on a wager, the subject-matter of which is contrary to public policy. A wager of this nature creates an improper interest in the result of the trial, and has a tendency to induce the parties to suppress the truth or to procure false testimony. There are many instances in which wagers have been held void as being contrary to public policy. *Allen v. Hearn* (a), which was a wager between two voters respecting an election, and in which Lord *Mansfield* says, "A gaming contract should not be encouraged if it has a dangerous tendency. What is so easy, in a case where a bribe is intended, as to lay a wager? It is difficult to prove that the wager makes him give a contrary vote to what he would otherwise have done; but still it is a colour for bribery. It has an influence on his mind. Therefore in the case in *Cowper* (b), if the wager had been laid with a lord of parliament or a judge, it would have been void from its tendency, without considering whether a bribe was really intended or not." So in the present case it is impossible to know the real nature of the wager, but it clearly has a tendency to produce an injurious effect. In *Hartley v. Rice* (c), a wager that one of the parties would not marry within a certain number of years was held to be void on the ground that it had a tendency to discourage marriage. So a wager on the life of *Napoleon Bonaparte* was held illegal on account of its tendency to encourage assassination. *Gilbert v. Sykes* (d). And in *Da Costa v. Jones* (e), a wager on the sex of the Chevalier *D'Eon* was considered void. *Jones v. Ran-*

(a) 1 T. R. 56.

(b) *Jones v. Randall*, Cowp. 37.

(c) 10 East, 22.

(d) 16 East. 150.

(e) Cowp. 729.

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dall will perhaps be relied on by the other side. That was a wager as to whether a decree of the Court of *Chancery* would be reversed on appeal; but that case is distinguishable, inasmuch as there the facts were ascertained at the time the wager was laid, and the parties being neither peers nor judges had no power over the events of the suit.

Jervis, in support of the declaration.—There are two classes of wagers which are discountenanced by the law; one where the subject-matter is of such an improper nature that the judge may refuse to try the cause, as in *Thornton v. Thackeray*(*f*); the other where the illegality arises from the wager being against public policy. This wager cannot be said to fall within either class. [Lord Abinger, C. B.—The first class of cases is exploded; the opinion now is that a judge is bound to try every record that comes before him.] It is said that this wager is against public policy, inasmuch as it had a tendency to give the parties an improper interest in the result of the trial; but the Court will not intend illegal conduct in any one. The cases relied on do not apply, as in all of them there was a *prima facie* illegality. *Allen v. Hearn* was decided on the ground that the wager was in fact a bribe to the voter: in *Hartley v. Rice* the wager was clearly in restraint of marriage, and therefore void. *Jones v. Randall* and *Waite v. Jones* (*g*) are in favour of the plaintiff. In the latter case, a man, for certain considerations, covenanted to execute a deed of separation from his wife; and the Court held it to be valid. In *Gilbert v. Sykes* the Court differed in opinion, *Grose*, J. considering that the action would well lie, but that the time of the Court ought not to be wasted in trying such causes. It would be no objection to the testimony of a witness that he laid a wager of that kind.

LORD ABINGER, C. B.—It appears to me, that upon the principle of the cases cited the Court is compelled to pronounce the wager illegal and void. No man has a right to acquire by his own act an interest in interfering with the administration of justice; more especially with the course of criminal justice, in which it is the duty of every man to disclose all he knows relative to the matter under investigation. In the present case a wager is laid which gives to one of the parties a direct interest in the conviction of the prisoner, and although we cannot tell in what way that bias may be exercised, or whether it will have any effect at all, yet the very tendency of the mind to act in such a way as to have an interest in perverting the course of justice is a sufficient ground for declaring the wager illegal. That was well established in *Gilbert v. Sykes*, a case which created considerable interest, and was much discussed in *Westminster-hall*. It was decided at a time when a very strong feeling prevailed against *Napoleon Bonaparte*, who threatened an invasion of the kingdom. But great satisfaction was afforded to myself and others who took an interest in the administration of public justice, by hearing the highest common law authority pronounce the wager void, as having a tendency to encourage assassination, which even in the instance of a public enemy should receive no encouragement by law. This however is a much stronger case. Here a person is about to be tried on a very important charge, during that time a wager is made, which gives to one or both the parties an interest in perverting the course of justice.

(*f*) 2 Y. & J. 156.

(*g*) 1 Scott, 730; 1 Bing. N. C. 656,
 affirmed on error, 5 Bing. N. C. 341.

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PARKE, B.—I entirely agree. No case has been cited at variance with the principle laid down by the Lord Chief Baron. It appears to me that it is a reasonable objection to this wager that it has a tendency to pervert the course of criminal justice. There ought to be every disposition on the part of all persons to come forward and give evidence relating to a criminal charge; and their minds should be totally free from bias; but the necessary tendency of this wager is to induce the parties either to give false testimony, or to abstain from giving evidence material to the elucidation of the case. And even if a party may not be in a situation to suppress or fabricate evidence, still he may influence the result of the trial by exciting the public mind, and deprive the party charged of a fair trial.

MAULE, B.—I entirely concur. It is now too late to say that no action can be maintained upon a wager, though perhaps it might have been better if the Courts had originally left them to the determination of the Jockey Club. The tendency of this wager is to pervert the course of public justice, and is therefore against public policy and void.

Judgment for the defendant.

MARTIN v. PORTER.

In trespass for working the plaintiff's mine, the measure of damage is the value of the material at the pit's mouth, without deducting the expense of getting it.

TRESPASS for breaking and entering the plaintiffs close, &c., and breaking and entering a coal mine, taking and carrying away the coal, and converting the same.

Plea: payment of 133*l.* into Court, and no damages *ultra*. Replication: damages *ultra*, upon which issue was joined.

At the trial before Parke, B., at the York Spring Assizes, it appeared that the plaintiff and defendant were owners of adjoining coal mines, and that in the year 1838 it was discovered that the defendant had worked the coal under the plaintiff's land to an extent exceeding a rood. The only question was upon what principle the damages were to be assessed. On the part of the plaintiff it was contended that the defendant was liable for the value of the coal when raised on the pit's bank, and without any deduction for the expense of its working; that he ought also to pay for the under-ground way-leave, and damages for breaking the barrier. The learned judge was of opinion that the plaintiff was entitled to the value of the coal at the pit's mouth, and also to compensation for the defendant passing through his land and using the way-leave, which in the neighbourhood was proved to be twopence a ton. The Jury calculated the damage upon that principle, and found the value of the coals 251*l.* 9*s.* 6*d.*, and gave 50*l.* for the use of the way-leave.

Alexander now moved to reduce the damages, and contended that they ought to be estimated by the value of the coal when lying undisturbed in its native bed.

Lord ABINGER, C. B.—I am of opinion that there is no ground for a rule.

The defendant was not entitled to any lien in respect of working the mine. Suppose the plaintiff had demanded the coal, could the defendant have said I will keep it, because I have been at the expense of getting it? How then can he now claim to deduct it? A party cannot set up his own wrong. The plaintiff had a right to treat these coals as a chattel interest, and he has done so. I cannot see why the value should be different, whether the taking is by mistake or intentionally.

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PARKE, B.—I remain of the same opinion as at the trial under this declaration; the plaintiff is at liberty to consider the coals as chattels, and to recover for the taking of them as such, for there is no doubt that when they were severed by the wrongful act of the defendant they became the plaintiff's chattels. The true computation of damage is the value of the coal when taken away by the defendant, that is to say, its value at the pit's mouth. That is a very salutary mode of computation, and will no doubt prevent these mistakes in future.

ALDERSON, B.—I am of the same opinion. The plaintiff is entitled to recover for a trespass to his goods. Those goods are in a particular place, and he was entitled to their value when taken from thence.

MAULE, B. concurred.

Rule refused.

TUCK v. TUCK.

DEBT on an account stated. The defendant pleaded *nunquam indebitatus*, and a set-off covering the sum specified in the declaration. At the trial before Lord Abinger, C. B., at the *Middlesex* Sittings after *Michaelmas* Term, it appeared that the plaintiff claimed the sum of 30*l.* upon an I O U, which was proved. The defendant then gave evidence in support of the plea of set-off, and proved a cross demand to the amount of 9*l.* 10*s.* A verdict was taken for the plaintiff for 20*l.* 10*s.*, leave having been reserved to the defendant to move to enter a verdict distributively on the plea of set-off. A rule *nisi* having been obtained accordingly.

Pleas of payment and set-off are not divisible, unless the sums proved under them, taken together with the other pleas, afford an answer to the whole cause of action.

Jervis and *Mansel* appeared to show cause, but were stopped by the Court.

Peacock in support of the rule.—The defendant having proceeded as to part of the issue is entitled to have the verdict entered for him as to that portion. *Cousins v. Paddon* (a) is an authority to show that a plea of set-off is divisible. —[*Parke*, B.—There the plaintiff's claim was covered partly by the plea of payment and partly by the set-off. As to the plea of set-off being divisible, the case of *Moore v. Butler*, (b) is expressly to the contrary.]—The plaintiff having put the defendant to the entire proof of his set-off, the latter is entitled

(a) 2 C. M. & R. 547

(b) 7 A. & E. 595. 2 Nev. & P. 547.

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to the costs of proving it. It is no hardship on the plaintiff, as he should have admitted so much of the claim as he knew to be due.—[Lord Abinger, C. B.—The defendant should have pleaded the set-off to such amount only as he could prove.]—In the case of a plea of payment to the whole declaration, together with a plea of set-off to the whole declaration, if the defendant proves a payment and a set-off, each to the extent of half the plaintiff's demand only, the defendant would be entitled to a verdict; there seems then, no reason why the plea is not equally divisible in the present case. If it be otherwise, great inconvenience would ensue, for the defendant might in truth have a set-off to the full extent of the plaintiff's claim, but from some unexpected cause be unable to prove the whole; and then, in order to guard against such a contingency, it would be necessary to put on the record numerous pleas of set-off as to different sums.—[Lord Abinger, C. B.—According to the old rule of pleading, if the defendant plead falsely as to part, the issue was found against him as to the whole. The set-off should have been limited to the amount which the defendant was capable of proving.]—If the plea be not divisible, this further difficulty would arise—that if a cross action be brought for the amount of the set-off, it would not appear by the record whether or no the plaintiff had allowed it in mitigation of his damages.

Lord Abinger, C. B.—On principle this case must be decided against the defendant. This is an action of debt; but according to modern decisions, it stands upon the same footing as actions of *assumpsit* as to proof of the sum alleged in the declaration. Formerly, indeed, the Courts were more strict in actions of debt, and required the parties to prove the precise claim in the declaration, or alleged in the plea to have been paid. By the plea of set-off the defendant has the same privilege that he always had; if he chooses to confine his plea to the precise sum which he can prove, he is entitled to a verdict; but it is an advantage to him to be allowed to prove generally that a greater sum is due to him than the amount of the plaintiff's demand; but then he has no right to convert that advantage to the prejudice of the plaintiff, by saying, I will first take my chance of proving the whole, and if I fail, I will have the same benefit on the proof of any part. The general rule must apply, that if a party plead a special plea, and fails in proving any important part, he fails in proving the whole. Here the defendant states that the plaintiff is indebted to him in a sum larger than that which he owes the plaintiff; that allegation is negatived by the evidence, and turns out to be false. However, thinking myself that where several pleas are pleaded to the whole, and the defendant proves certain portions, none of which by itself would cover the whole debt, but which taken together would do so, he is entitled to a verdict; for instance, it may turn out that there is a payment as to part of the account and satisfaction as to another part, and a set-off as to the residue. It is an advantage to the defendant to allow him to plead generally to the whole, but I do not think that he is entitled to a verdict where he leaves a part unanswered.

PARKER, B.—I am also of opinion that the rule ought to be discharged. The defendant having shown that a sum of 9*l.* 10*s.* was due to him from the plaintiff, insists that he has a right as to that amount to have the plea of set-off found for him. This is an action of debt, not *assumpsit*; but that is

not material. I still think the defendant not so entitled. The point was fully considered in the case of *Cousins v. Paddon*, the effect of which is that *indebitatus assumpsit* and debt on simple contract must stand upon the same footing; so long as it is considered unnecessary to prove the precise sum alleged in the declaration; the precise sum cannot be admitted by the plea. That case decided that the pleas of payment and set-off are divisible, and that if the defendant proves so much of each as taken together covers the whole of the plaintiff's demand, the defendant is entitled to a verdict. The late decision in the *Queen's Bench* (c) requires us to see what construction is to be put on a plea of set-off by itself; and unless a liberal construction be put upon it, great inconvenience will ensue. With regard to *indebitatus assumpsit*, the cases previous to *Cousins v. Paddon* clearly established that the defendant was entitled to succeed upon the whole record, wherever he answered the plaintiff's case by pleas of *non-assumpsit*, bankruptcy, set-off, statute of limitations, &c.; and although such plea was pleaded to the whole, yet if he answered the plaintiff's case partly by *non-assumpsit*, and the rest by payment or set-off, he would be equally entitled to judgment. If that rule had not been adopted in the action of debt, the greatest inconvenience would have ensued, and a defendant could not have been secure unless this construction were put upon the plea of set-off; viz., that the defendant undertakes to prove that the plaintiff is indebted to him in an equal or a larger sum than he is indebted to the plaintiff. So that if after taking off so much of the plaintiff's claim as is answered by the other pleas, the defendant can in the form of a set-off show that a greater amount remains due to him than he shall be found indebted to the plaintiff, he is entitled to have a general verdict entered for him. That is the reasonable and fair construction of a plea of set-off, and seems quite essential to the ends of justice. But it is quite different to say that such construction shall be put upon the plea where there is no answer to the rest of the plaintiff's demand. The plea means that the plaintiff is indebted to the defendant in a sum greater than that claimed in the declaration, so that according to the strict mode of construction, the plea in an action of debt, would amount to an admission of the whole demand; in *assumpsit*, of some demand being due to the plaintiff, and whatever that might be, the plaintiff would be entitled to judgment in default of the defendant's undertaking to prove the plea. However the latitude alluded to has been introduced in the case above mentioned, and the plea of set-off has been construed under peculiar circumstances, as entitling the defendant to prove due to himself as much as he can, which may be taken in connection with the other pleas as an answer to the plaintiff's case, yet I cannot agree to put such a construction on the plea, as to entitle the defendant to a verdict where he does not succeed in showing that the plaintiff is indebted to him in an equal or greater sum than he is to the plaintiff on the whole record. I concur in the judgment of the Court of *Queen's Bench* in the case of *Moore v. Bullin*, and the reasons there given for not dividing the plea of set-off are to my mind perfectly satisfactory.

Rule discharged.

(c) *Moore v. Bullin*.

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ATTORNEY-GENERAL *v.* MANGLES and others.*Exchequer.*

A testator by will, after giving certain legacies, bequeathed to his executors, &c., the residue of his estate, real and personal, upon trust, at such times as they should think fit, to sell, convey, or otherwise convert into money, the same or any part thereof. He also directed that the residue of his estate should be invested as it should be realized, and should be divided amongst his children in certain specified shares and proportions; that in case any of his daughters should marry under twenty-one, the trustees should settle her fortune upon such trusts as are specified in the will of testator's father, with respect to certain bequests of personal property

to testator's sisters; and he directed that the trustees should have full power in making such sales, of causing any part of the real or personal estate to be valued instead of being sold, and of allotting such part to any of his children at the amount of the valuation, as part of his or her proportion of his residuary estate, but to be considered as personal property.

The trustees sold the personal and a large portion of the real estate; and the residue of the real estate they caused to be valued, and allotted the same to the son at the amount of valuation. The proceeds of the estate, which had been sold, they divided amongst the daughters, according to the respective shares:—*Held*, that legacy duty was payable only on the amount of that part of the estate which had been actually sold.

INFORMATION for legacy duties.—The information stated, that theretofore, and after the 31st August, 1815, to wit, on the 7th of July, 1831, in the county aforesaid, one John Christie made his last will and testament in writing, duly executed and attested, according to the form of the statute in that case made and provided, for the passing of real estates, and thereby appointed Caroline Christie, his wife, C. J. Falconer, Robert Mangles, H. Boldero, T. Edgar, P. Christie, and T. Treacher, to be executors and trustees of his said will; and the said J. Christie, by his said will, after giving certain legacies and making certain bequests as therein particularly mentioned, gave, and demised, and bequeathed unto his said executors therein named, their heirs, executors, and administrators, all the rest and residue of his estates, real and personal, upon the following trusts, viz. upon trust, at such times as they his said executors might think expedient, to sell, convey, or otherwise convert into money, the same or any part thereof; for which purpose the said testator, by his said will, declared that the receipts of his said executors should be sufficient discharges to all purchasers, who should not be bound to see to the application of their purchase-monies. And the said testator, by his said will directed, that the clear proceeds of his estates, and all other his property not specially bequeathed, should be applied and disposed of as follows, viz. the sum of 20,000*l.* should be paid or invested upon the trusts of his marriage settlement, directed by the Court of Chancery, in the suit instituted relating thereto; and that his trustees should invest, in their own names, the sum of 30,000*l.* and pay the interest or dividends thereof to his wife during her life, if she should not re-marry, and upon her death or re-marriage, that the said 30,000*l.* should sink into the residue of his estate. And the said testator, by his said will directed, that all the residue of his estate should be invested as it should be realized, and should be divided amongst all his the said testator's children, in such shares and proportions, that his the said testator's son, then born, should take four shares, any other son or sons which he the said testator might have, should take three shares each; but if his the said testator's son, then born, should die before attaining the age of twenty-one years, and without leaving issue, the said testator, by his said will directed, that his the said testator's next son should take four shares; or if he the said testator should have no other son, then that his the said testator's eldest daughter should take

three shares. And the said testator, by his said will directed, that in the event of any of his the said testator's children dying under the age of twenty-one years, and without issue, his or her legacy or share should be considered as having lapsed. And it was further directed by the said will, that in case any of his the said testator's daughters should marry under the age of twenty-one years, his the said testator's trustees should settle her fortune upon such trusts, for the benefit of herself and her issue, and with the like trusts and remainders over, in favour of his the said testator's other children, as were specified in the will of the said testator's father, with respect to certain bequests of personal property, to the sisters of the said testator therein contained. And the said testator, by his said will directed, that the said trustees should have the discretion, during the minorities of the said respective children, of applying any part of the income of their respective fortunes for their maintenance and education, and that in such way and by such hands as they his said trustees should think fit, and also of advancing any part not exceeding one-half of the capital of the respective fortunes of his the said testator's children, for establishing the said children in marriage, or otherwise in life. And the said testator, by his said will further directed, that his trustees should have full power, in making such sales as in the said will were directed, to resort to either public or private sale, and to buy in at public sale and resell, and should also have the discretion to defer any sale, so long as they might think fit, and of causing any part or parts of his the said testator's real or personal estates to be valued instead of being sold, and of allotting such parts to any or either of his the said testator's children, at the amount of the valuation, as a part of his or her proportion of his the said testator's residuary estate, but to be considered as personal estate, and subject to the trusts in the said will declared respecting such proportions of residuary estate. And in case of any such allotments, his the said testator's trustees should have discretionary powers of leasing and managing such respective allotments during the minorities of his the said testator's children, and the like powers as to all his the said testator's freehold and leasehold properties, until the same should be sold.

The information then went on to allege, that on the 10th of *July*, 1831, the said *J. Christie* died, without altering or revoking his said will; that he had one brother and two sisters, who, together with the said *John Christie*, were severally named in the will of the said *John Christie's* father; and it then set out his father's will before referred (which did not appear to be sufficiently material to the present case to require insertion). The information then alleged, that the testator, at the time of the making of his will, and thence until and at the time of his death, was seised and possessed of divers freehold and copyhold estates of great value, to wit, freehold estates of the value of 200,000*l.*, and copyhold estates of the value of 100,000*l.*, and was also, before and at the time of his death, possessed of certain leasehold and personal property of great value, to wit, leasehold property of the value of 100,000*l.*, and personal property of the value of 100,000*l.* That the said *J. Christie*, at the time of his death, had one son and four daughters, viz., *William John Christie*, *Caroline Christie* the younger, *Charlotte Christie*, *Anna Christie*, and *Mary Christie*, and that the said testator died, leaving his said several children, and also the said *Robert Mangles*, *H. Boldero*, *T. Edgar*, and

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P. Christie, respectively him surviving. That the said *Robert Mangles*, &c. after the decease of the testator, to wit, on &c., took upon themselves the burthen of the execution of the said will, and then and there paid and satisfied the funeral expenses, and also the just debts of the testator, and also the said legacies and bequests given by the said will of the said *J. Christie*, save and except the said residue so devised and bequeathed as aforesaid. That the residue of the real and personal estate and effects of the testator, remaining after the payment of the funeral expenses, debts, legacies and bequests, so paid and satisfied as aforesaid, then and there was of great value, to wit, of the value of 320,000*l.*, and that the same then and there remained and was in the possession of the said *R. Mangles*, &c., as such executors as aforesaid, who then and there were seised and possessed thereof respectively, upon the trusts, and for the purposes in the said will in that behalf specified, and thereinbefore set forth; and it then and there became and was the duty of the said *R. Mangles*, &c. to *sell, convey, or otherwise convert into money*, the said residue of the real and personal estate of the said testator, and to apply and dispose of the proceeds thereof in the manner and for the purposes in the said will mentioned; or, *if they thought fit, to cause any part or parts of the said residue to be valued instead of being sold, to allot such part or parts to any or either of the said children of the said testator, at the amount of the valuation, as a part of his or her proportion of the said residuary estate, but to be considered as personal estate, and subject to the trusts in the will respecting such proportions of the said residuary estate.* That the said *R. Mangles*, &c., after the decease of the said testator, to wit, on &c., in &c., sold and converted into money certain real estates, being a large part of the said residue of the real and personal estate of the testator, to wit, the amount of 180,000*l.*, and also then and there caused to be valued certain other real estates, being the remaining part of the said residue of the real and personal estate of the said testator, which consisted of real estate, and the same was then and there valued at a large sum of money, to wit, 90,000*l.* The information then proceeded to allege, that after deducting from the sum of 320,000*l.*, being the total amount of the residue, the two sums of 20,000*l.* and 30,000*l.* directed to be applied for the purposes of the marriage settlement and the benefit of the wife of the testator, the remaining part of the residue being of large amount, to wit, to the amount of 270,000*l.*, then and there became and was divisible amongst the said one son and four daughters of the testator, in the manner and in such shares and proportions as in the said will in that behalf directed, viz. the sum of 90,000*l.*, being four shares or parts of the said sum of 270,000*l.*, the whole into twelve shares, being divided, then and there became and was the share and proportion of the said *W. J. Christie*, as being the only son of the said testator, and four sums of 45,000*l.* each, such sums being each of them two parts or shares of the said sum of 270,000*l.*, then and there became and were respectively the shares and proportions of each of the said daughters of the said testator. That the duty which ought to have been paid for and in respect of the said shares of the said residue to the children of the testator, according to the provisions of the statute in that behalf made then and there, amounted to a large sum of money, to wit, the sum of 2,700*l.* That the said *R. Mangles*, &c., after the decease of the testator, and after they had so taken upon themselves the burthen, &c., and after the said valuation, &c., to wit, on, &c., allotted unto

the said *W. J. Christie*, then and there being the only son of the said testator, the said real estates, being the said portion of the said residue of the real and personal estate of the said testator, which had been so valued at 90,000*l.* at the amount of that valuation, as and for his share and proportion of the said residue, under and by virtue of the will, and then and there required for the benefit of the said *W. J. Christie*, the said portion of the said residue so valued as aforesaid, and being of the said amount, without having first paid the duty, to wit, the sum of 900*l.*, then and there chargeable for, &c., in respect of the said bequest to the said *W. J. Christie*. There was a similar allegation as to the 180,000*l.*, the proceeds of the sale of the estate retained for the benefit of the four daughters.

To both these breaches there was a general demurrer, and joinder in demurrer.

The points marked for argument on the part of the defendants were—first, the defendants contend that under the Act 55 *Geo.* 3, c. 184, schedule part 3, tit. “*Legacies*,” no duty is payable in respect of the land allotted by virtue of the power to allot, contained in the will of *John Christie*; secondly, that under the same Act no duty is payable in respect of the land sold, as mentioned in the first count of the information.

The points marked on the part of the *Attorney-General* were as follows. The *Attorney-General* claims the payment of the legacy duty, under the 45 *Geo.* 3, c. 28, ss. 1 & 4; and 55 *Geo.* 3, c. 184, schedule part 3, tit. “*Legacies*,” in respect of the share allotted to *W. J. Christie* in real estate, and valued at 90,000*l.*; and also in respect of the said sum of 180,000*l.*, being the proceeds of that part of the residue of the testator's estate, being real estate, which had been sold and converted into money pursuant to the directions in the said will. And the *Attorney-General* will argue that such duty is due and payable, because, by the will, a direction is given to the executors to sell the real estate devised; and further, that the effect of such direction is not controlled by the discretionary power given to the trustees to allot portions of the real estates, for it is expressly provided by the testator, that any portion allotted shall be considered as personal estate, and shall be taken as such by the allottee at the amount at which it has been valued; such allotment, therefore, being but a sale of the allotted portion to the allottee.

Wightman, in support of the demurrer.—By the terms of the will, the executors are vested with a discretion as to whether or no they will sell the real estate. The question, therefore, will turn on the construction to be put on the 55 *Geo.* 3, c. 184, sched. 3, tit. “*Legacies*,” the words of which are, “For the clear residue when given to one person, and for every share of the clear residue when given to two or more persons of the monies to arise from the sale, mortgage, or other disposition of every real or heritable estate directed to be sold, &c.” The fund to be chargeable must be a legacy arising from personal property, or from land directed by the will to be sold. Though it is admitted, that if the land be directed to be sold, and is not sold, but taken by the object of the bounty, the legacy duty would attach. The *Attorney-General* v. *Holford* (a) is an authority to that effect. But there the will contained an absolute direction to sell at all events, and the legatee having consented to

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accept the land, it was considered for the purpose of legacy duty, as if it had in fact been sold.—[*Parke, B.*—There is no doubt upon the second question. The duty is clearly payable in respect of the land actually sold.]—[*Lord Abinger, C. B.*—The only question is, whether the trustees have an option to sell or not.]—The trustees are by no means bound to sell, but may if they please avoid a sale altogether. The words “to be considered as personal estate” can have no effect whatever, unless in legal construction it be personal estate; the testator directing that it shall be considered as personal estate, will have no weight, for if the converse of the proposition be taken, and the direction was, that personal property should be considered as real estate, it could not on that account be less liable to legacy duty. *In re Evans (b)* resembles the present case; there *Lord Lyndhurst*, in delivering the judgment of the Court, observes that no case had hitherto gone so far as to say that duty was payable, when there was not either an express direction to sell, or a manifestation in the will of the intention of the testator that there should be a sale. The present case is within the rule there laid down. There is neither a specific direction to sell; nor does it appear, taking the whole will together, that there was any necessity for selling. It is true, that at the commencement of the will, the estates, both real and personal, are conveyed to trustees upon trust, at such times as they might think expedient to sell, convey, or otherwise convert into money; and it may be admitted, that if that had been the only direction, it might have been said that there was an express direction to the trustees to sell, and although by arrangement with the legatees the land was taken at a valuation, still the duty would have attached. But if the subsequent part of the will be looked at, it will be found, that so far from there being a direction to sell, there is the widest discretion given to the trustees as to whether they should sell at all.

The Court called upon—

The Solicitor-General contra.—The legacy duty is payable upon the whole estate. If a direction to sell is to be ascertained from the context of the will, it is sufficient to make the property chargeable, though there be no express words to that effect. It is clear that the testator intended that the property should be sold. He directs that all the residue of his estate should be divided into twelve parts, four of which were to go to the son and two to each of the four daughters. That is an express direction to convert into personalty for the purpose of distribution. Then there is this important direction, “that in the event of any of his the testator’s children dying under the age of twenty-one years, and without issue, his or her legacy or share should be considered as having lapsed”—and, “that in case any of his daughters should marry under the age of twenty-one years, his trustees should settle her fortune upon such trusts, for the benefit of herself and her issue, and with the like trusts and remainders over for his other children, as were specified in the will of his father.” The will further directs that the trustees should have the discretion during the minorities of the testator’s respective children of applying any part of the income of their respective fortunes for their maintenance and education, and that in such way and by such hands as they his said trustees should think fit; and also of advancing any part not ex-

ceeding one-half of the capital of the respective fortunes of his children for establishing the said children in marriage, or otherwise in life. That provision could never be carried into effect, unless the whole property were converted into money. Then as to the power of allotment, it is submitted that it was never intended to interfere with the direction eventually to sell. It is said that a party cannot give to real estate the character of personalty, by merely directing that it shall be so considered. It is true that you cannot impress upon real estate such a character as to render it descendible according to the rules applicable to personal estate; but in settlements it is in effect done by directing the real estate to be sold. The words, "shall be considered as personal estate," means that the trustees may defer the sale as long as they think fit, but that the whole shall eventually be sold. Now, as to the provision respecting any of the children dying under twenty-one, suppose the son had married at the age of nineteen, and had issue two sons, and died, did the testator intend that the trustees should have the option of saying whether the second son was to be a beggar or to have forty thousand pounds. Besides the shares of the daughters are directed to be settled in the same mode as the shares of the testator's sisters are settled under the will of their father. By that will the fortune of each daughter was to be settled on her for life, remainder to the husband for life in case she married, and afterwards to be divided amongst the children of the marriage. Suppose under such a settlement, a child had died in the lifetime of its parent, leaving issue, the share of such child would have gone amongst the issue as personal estate. Besides, what estate does any party take with property to be allotted? If a daughter should marry under twenty-one, and afterwards the trustees allot the estate, in what way is it to be conveyed. In the case of *In re Evans* this difficulty did not arise, because there the property was directed to be divided into three shares for three persons, who were to take for life; and after their death it was to be divided amongst the children, as tenants in common, and their respective heirs, executors, and administrators. Up to the clause of allotment, the trusts of the will were to convert the whole estate into money, and divide it in certain proportions amongst his children; but as the children are under age, and it will be necessary first to ascertain what each is to have, the testator obviates the difficulty by allowing the trustees to allot any part of the estates to either of the children as his share; but nevertheless "to be considered as personal estate, and subject to the trusts declared as to the residuary estate." These latter words must be struck out, unless the Court hold this a direction to turn the estate into money.—[*Parke, B.*—In the other point of view, you must strike out the words "and of causing any part or parts of the testator's real or personal estate to be valued instead of being sold."]

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Wightman, in reply, was stopped by the Court.

LORD ABINGER, C. B.—It is admitted on all hands, that for that portion of the estate which has been sold, the legacy duty is payable. The only question is as to the remainder, and that turns upon a very narrow ground, viz., whether the trustees had a discretion to sell or not. The argument of the *Solicitor-General* is this, that certain cases may occur in which it would be very difficult to exercise a discretion; but I think that we are not to judge by that nice disquisition of cases which may possibly occur. The trustees have a

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discretion which they may exercise, and that distinguishes this case from those which have been decided as to a direction to sell. I think, therefore, that the judgment must be against the crown as to that point.

PARKE, B.—The crown is clearly entitled to the legacy duty with respect to that part of the estate which is sold. As to the remainder, the question is, whether taking the whole will together, there is a direction to the trustees to convert the estate into money, or whether it is left to the discretion to sell or not. No doubt, according to the authority of the *Advocate-General v. Ramsay's Trustees (c)*, the words of discretion may be so controlled as to become directory, and in that case the legacy duty would attach. Here there is a discretion not to sell in certain cases. The will provides that the trustees may resort to a public or private sale. It gives them the power of selling, or of deferring the sale, and of causing any part of the estate to be valued, not before it is sold; but instead of being sold, I admit that there may be some difficulty in treating it as personal estate, subject to all the trusts in the will, and that it may be difficult for the trustees to comply with the directions given in this part of the will; but at the same time I cannot say that there is no discretion not to sell, and if they think fit not to sell the duty does not attach.

ALDERSON, B.—According to the case of the *Advocate-General v. Ramsay's Trustees*, if there be words of discretion, they may be controlled by the other parts of the will, so as to be in fact words of direction. Here it is not so. The *Solicitor-General* has argued that it would be very difficult to carry that discretion into effect, in certain cases, which he has put, with which I agree; but those ingenious cases may never occur at all. The testator might have meant to give a discretion for the purpose of enabling the trustees to sell, in order to get rid of any difficulty which might arise; but in case the circumstances of the family were such as not to require it, then that they might allot the real estate. Unless the discretion is taken away, at all events the case is not within the authority of the *Advocate-General v. Ramsay's Trustees*. In many cases it might be the duty of the trustees to allot this as land.

MAULE, B., concurred.

Judgment for the defendants.

(c) 2 C. M. & R. 224.

HOLT v. MIERS.

A. agreed with B. to lend him 200*l.* at interest after the rate of 1*s.* in


the pound per month, and, for the purpose of evading the usury laws, the sums advanced were to be secured by promissory notes, payable one month after date, and renewable when due, and for each renewal 1*s.* in the pound was to be paid:—Held that the notes were rendered valid by the 3 & 4 Will. 4, c. 98, s. 7, and 7 Will. 4, and 1 Vic. c. 80.

ASSUMPSIT by the payee against the maker of a promissory note for 21*l.* 10*s.*, dated the 4th of September, payable one month after date. There was also a count upon an account stated.

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The defendant pleaded, as to the first count, that before the making of the said promissory note, to wit, on the 20th day of April, 1838, it was corruptly, and against the form of the statute in that case made and provided, agreed by and between the defendant and one *Thomas Whitmarsh*, that the said *Thomas Whitmarsh* should advance and lend to the defendant the sum of 200*l.*, and that the same should be a continuing loan so long as the defendant should pay the usurious interest for the said loan as is next hereinafter mentioned, or for such portion thereof as he, the said *Thomas Whitmarsh*, should advance and lend to the defendant; and that it was then and there further corruptly agreed, &c., that he should pay the said *T. Whitmarsh* 1*s.* in the pound for each month, for forbearing and giving day of payment for such sums as the said *T. Whitmarsh* should advance and lend to the defendant, which said 1*s.* per pound per month amounts to more than 5*l.* per cent. per annum; and that it was further agreed, in order to evade the said statute, and by way of cunning shifts and device, that, at the time he, the said *T. Whitmarsh*, should advance and lend to the defendant any portion of the said sum of 200*l.* the defendant should make and deliver to the said *T. Whitmarsh* his promissory note, payable at one month after date, and that the said note or notes should be respectively renewed at the several times when the same should be respectively fall due, for one month; and that on each of such renewals the said *T. Whitmarsh* should receive from the defendant the sum of 1*s.* in the pound by way of discount for the same, &c. The plea went on to aver, that, in pursuance of such corrupt bargain and agreement, the said *T. Whitmarsh*, on the 20th April, 1838, did advance and lend to the defendant the sum of 30*l.*, for which the defendant then and there made and delivered his promissory note for 30*l.*, payable at one month, to the said *T. Whitmarsh*; and the said *T. Whitmarsh* did then, in pursuance of the said corrupt bargain and agreement, take and receive from the defendant the sum of 30*s.*, as and by way of discount on the same; and the said note, when it fell due, was successively renewed on the 22d of May, 25th of June, 26th of July, 26th of August, and 28th of December; upon each of which several renewals the said *T. Whitmarsh* took and received, in pursuance of the said corrupt bargain, &c., the several sums of 30*s.* for each renewal by way of discount; that, in further pursuance of the said corrupt bargain, the said *T. Whitmarsh*, on the 4th of August, 1838, advanced and lent to the defendant the further sum of 21*l.*, on the defendant's note, bearing date the said 4th of August, payable one month after date, and did then take and receive of the defendant 1*l.* 10*s.*, by way of discount, and the said note, when it became due, was renewed on the 4th of September, which said last-mentioned note is the note mentioned in the first count of the declaration, and was made payable to the plaintiff, as attorney to, and trustee for, the said *T. Whitmarsh*, which said several sums of money amount to a larger sum than 5*l.* per cent., &c., against the form of the statute in such case made and provided. The replication denied the agreement stated in the plea.

At the trial before *Gurney, B.*, at the sittings after last Michaelmas Term, the defendant obtained a verdict, having proved the facts alleged in the plea. In Hilary Term, *Erle* obtained a rule to shew cause why judgment should not be entered for the plaintiff *non obstante veredicto*, on the ground that since the stat. 3 & 4 *Will.* 4, c. 18, s. 4, and 7 *Will.* 4, & 1 *Vic.* c. 80, the facts stated in the plea were no answer to the action.

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Against which rule

Curwood and Carrington shewed cause.—The question depends upon the construction to be put upon the 3 & 4 Will. 4, c. 98, s. 7, which enacts, “that no bill of exchange or promissory note made payable at or within three months after the date thereof, or not having more than three months to run, shall, by reason of any interest taken thereon or secured thereby, or any agreement to pay or receive or allow interest, in discounting, negotiating, or transferring the same be void, nor shall the liability of any party to any bill of exchange or promissory note be affected by reason of any statute or law in force for the prevention of usury, nor shall any person drawing, accepting, indorsing, or signing any such bill or note, or lending or advancing any money, or taking more than the present rate of legal interest in Great Britain and Ireland respectively for the loan of money on any such bill or note, be subject to any penalties under any statute or law relating to usury, or any other penalty or forfeiture.” The words “any bill of exchange,” &c., in the second portion of the above section, ought to be read and understood as if the legislature had said “any such bill,” and as referring to the succeeding part of the clause, which exempts from the usury laws bills or notes for a period not exceeding three months. The 7 Will. 4, & 1 Vic. c. 80, extends the period to twelve months, but in other respects is similar to the former statute. The cases determined on these statutes are few in number, but their tendency has been rather to restrict than extend the operation of them. In a late case of *Valance v. Siddell* (a), Lord Denman said that he was inclined to think that the words “any bill” had been misprinted, and had, consequently, caused the parliament roll to be searched, when it appeared that the statute had been accurately copied; but his Lordship observed that, whenever a case came before the Court, it would be material to consider whether they should not construe those words with reference to the previous expression, “any such bill.” In *Berrington v. Collie* (b), it was held that a loan of money at more than 5l. per cent upon the security of the deposit of a lease, a warrant of attorney and a promissory note was not protected by the 3 & 4 Will. 4, c. 98, s. 7. There *Tindal, C. J.*, says—“We think such a transaction as was contended for is not brought within the words of the 3 & 4 Will. 4, c. 98, s. 7, or the 7 Will. 4, & 1 Vic. c. 80, those acts contemplating the case of interest taken upon or secured by a bill of exchange or promissory note as the real and *bona fide* ground of the debt, and not extending to a bill of exchange or promissory note, given in addition to a security of another nature, not protected by the statute upon which the debt was really contracted; for if the latter case should be held to be comprised within the Act it would in effect nearly operate as a general repeal of the statute of usury, by enabling persons who had lent money upon mortgage at usurious interest to sue for and recover principal and interest upon a bill or note though the mortgage security might be void.” So here there is an express admission upon the record of an agreement to avoid the statutes against usury. But there is a decision in the Bankruptcy Court, in *Ex parte Terrewest*, in *re Poynter* (c), precisely in point. There the sum of 1,600*l.* was lent at 10*l.* 10*s.* interest, and for the avowed purpose of evading the statutes of usury, a promissory note was given, payable three months

(a) 6 A. & E. 932; 2 Nev. & Per. 78
 (c) Mont. & Ayr.

(b) 5 Bing N. C. 332.

after date. and renewable at the option of the borrower at periods not exceeding eighteen months, and that Court considered the transaction invalid (d).

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Erle and *Wordsworth*, contra, were stopped by the Court.

LORD ABINGER, C. B.—The question is, whether this case comes within the words of the 3 & 4 *Will.* 4, c. 98, s. 7. Here a promissory note is given, the object of which is to secure unlawful interest; but the statute says that a note for the period therein mentioned shall not, by reason of any interest taken thereon or secured thereby, be void. Then how can it be contended that it is so by the statute of *Ann.* or any other antecedent statute. The note would not be void at common law (e), for usury is a matter altogether regulated by statute.

PARKER, B.—I am of opinion that there ought to be judgment for the plaintiff *non obstante veredicto*. I should have felt no doubt about the construction of the Act were it not for the decision of the Court of Bankruptcy, which has been referred to. But notwithstanding that case, I think this note is rendered a valid security by the 3 & 4 *Will.* 4, c. 98, s. 7. The Act ought to be construed according to its natural import, and unless there be something in the other parts to point to a different construction; but I can see nothing to controul the natural and ordinary meaning of the clause. The words are "that no bill of exchange or promissory note made payable within three months shall, by reason of any interest taken thereon or secured thereby, be void." Here is a case where one of the objects was to secure the payment of interest, although it appears that part of the principal was also secured. Had those been the only words used in the Act, there might have been room for doubt, but the legislature goes on to state, "that the liability of any party to any bill of exchange or promissory note shall not be affected by reason of any statute or law for the prevention of usury." This bill, then, is exempted from the laws of usury by the express words of the statute; no words can be more general. The plea, therefore, discloses no defence to the action on the ground of the statute of usury. The cases of *Vallance v. Siddell* and *Berrington v. Collis* are beside the present question. According to the former, if the warrant of attorney had been taken as a security for the debt it would have been void, but if taken *bond fide* to secure the bill of exchange, or if the bill were given as the original security for the usurious interest, it would have been good. *Berrington v. Collis* turned upon the question of fact, whether the security for the original loan were the lease or the bill. Those cases, therefore, are perfectly consistent with each other, and with the construction which we put upon the statute. Then as to the case in the Court of Bankruptcy, I think the judges have given too narrow a construction to the statute. Possibly it may have been the intention of the legislature to confine the repeal of the statute of usury to cases only where bills already given are

(d) See *Ex parte Terrewest* before the Lord Chancellor, 4 Nov. 1839.

(e) See judgment of De Gray, C.J. in *Lloyd v. Williams*, 3 Wils. 259.

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negotiated at usurious interest, but the words used are not such as to enable us to carry such intention into effect.

GURNEY, B., and MAULE, B., concurred (c).

Rule absolute.

(c) See 2 & 3 Vic. c. 37.

JONES v. DANVERS.

Where a defendant is in custody under military arrest the Court will not grant a *habeas corpus* for the purpose of charging him in execution.

BAYLEY moved for a writ of *habeas corpus* to bring up the defendant to be charged in execution. The defendant was in custody at Woolwich, under an order of the Lords of the Admiralty, but it did not appear whether or no he would be tried by a court-martial.

Per CURIAM—Under the circumstances, we have no power to change the custody. If we allowed him to be charged in execution, we should be making the naval gaoler responsible in the event of the defendant's escape.

Rule refused.

BRYANT v. FLIGHT.

A. wrote to B. as follows:—

"I hereby agree to enter your service as a weekly manager, to commence next Monday. The amount of payment I am to receive I leave entirely to you to determine."

Held (*Parke, B., dissentiento*), that the plaintiff was entitled to some remuneration.

ASSUMPSIT for wages.—Plea, *non-assumpsit*. At the trial before *Alderson, B.*, at the Middlesex sittings after Michaelmas Term it appeared that the plaintiff claimed 36*l.* for six weeks' services, performed by him, in pursuance of an agreement, which was as follows:—"I hereby agree to enter your service as a weekly manager, to commence from next Monday. The amount of payment I am to receive I leave entirely to you to determine." Signed by the plaintiff. On this evidence the defendant's counsel, on the authority of *Taylor v. Brewer* (a), contended that the plaintiff ought to be non-suited, but *Alderson, B.*, left it to jury to say what was a reasonable remuneration for the work performed, which they having fixed at 20*l.*, he ordered a verdict for that amount to be entered for the plaintiff, reserving leave to the defendant to move to enter a non-suit. A rule nisi for that purpose having been obtained—

Kelly shewed cause.—The words of the agreement clearly show that it was the intention of both parties that the plaintiff should receive *some* wages, and it only leaves to the defendant the right of determining the quantum. The work having been performed, the law presumes the defendant willing to pay what is just and reasonable. *Taylor v. Brewer* is distinguishable from the

(a) 1 M. & Sel. 290.

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present case. There the plaintiff sought to maintain an action for wages on the following resolution of a committee—"Resolved, that any services to be rendered by *W*— shall, after the third lottery, be taken into consideration, and such remuneration made as shall be deemed right." That resolution left it to the determination of the committee whether or no remuneration should be awarded. But here it is not left to the defendant to say whether the plaintiff is to receive anything or nothing; he is to have some remuneration, and the amount only is left open.

ALDERSON, B.—There is a case of *Peacock v. Peacock* (b), where a man said to his son, "You shall have 15s. a week till October, and you shall then have a share. We need not talk of a share till October comes: we shall settle it then;" and his son having remained several years in the business, and no settlement ever having been made, it was held that an action lay by him to recover a reasonable compensation for his labour. That case is referred to in *Taylor v. Brewer*, and held by Lord *Ellenborough* to be distinguishable on this principle, that in the former the plaintiff was to have a share, at all events. So here it appears that the plaintiff was to have some wages, at all events.

Andrews, Serjt., *Hoggins*, *contra*.—The value of the plaintiff's services being unknown, the agreement leaves it to the defendant to determine how much the plaintiff is entitled to, or whether his services were of any value at all. If the agreement had been that a third party was to fix the amount of wages to be paid to the plaintiff, it is clear no action would lie until the party had fixed the amount, as it would be in the nature of a condition precedent. *Morgan v. Birnie* (c). The same principle will apply here. *Taylor v. Brewer* is quite in point.

Cur. adv. vult.

On a subsequent day the judgment of the Court was delivered by

PARKE, B.—In this case the plaintiff had made an agreement with the defendant to enter his service as a weekly manager, and the question raised is, whether, on the construction of the agreement which has been produced, the plaintiff is entitled to receive any remuneration for his services. My Brothers *Alderson*, *Gurney*, and *Maule*, who heard the argument, think that, according to the true construction of that instrument, the defendant is bound to pay the plaintiff something for his trouble, and that it does not enable the defendant to say "nothing at all is due to you," but that he is bound to award to the plaintiff something in consideration of his services. I own my impression is that it amounts to a mere honorary obligation on the part of the defendant, and I cannot distinguish the case from that of *Taylor v. Brewer*, which has been cited. As the majority of the Court, however, are of a contrary opinion, this rule must be discharged.

ALDERSON, B.—The ground on which my opinion proceeds is this, that the nature of the contract between the parties is to be deduced from the paper itself, and that the true criterion of the damages which the plaintiff ought to

(b) 2 Camp. 45.

(c) 3 M. & Scott, 76; 9 Bing. 672.

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recover is to see what amount of wages he would really and *bona fide* be entitled to if acting as a servant during the period specified.

LORD ABINGER, C. B., added—As the amount of remuneration is expressly reserved, it would seem to imply that something was to be paid. I agree, therefore, with the majority of the Court.

Rule discharged.

BICKNELL v. HOOD.

By an instrument dated 13th December, 1834, A., in consideration of the rents, covenants, and agreements therein-after mentioned, agreed to grant to B. a lease of certain premises *habendum* for two years and three quarters, wanting seven days, from the 25th December instant, paying a certain rent quarterly, the first payment to be made on the 25th March then next, which said indenture should contain covenants to pay rent and such other covenants as were contained in a lease referred to, and until such lease should have been granted as aforesaid it should be lawful for A. to distrain for all or any part of the rent which might become due in respect of the premises at any time after the execution of the agreement:—*Held,*

THIS was an action of assumpsit upon an instrument dated 13th December, 1834, and stamped as an agreement, of which the following is a copy:—

“ Wm. L. Bicknell, in consideration of the rents, covenants, and agreements herein-after mentioned, doth hereby agree to grant a lease unto W. C. Hood, his executors or administrators, of all that piece or parcel of ground, with the messuage thereon erected, &c., situate, &c. (together with the use of the several fixtures, articles and things enumerated in the schedule under-written), to hold the same, with the appurtenances, unto the said W. C. Hood, his executors, administrators, and assigns, for the term of two years and three quarters, wanting seven days, from the 25th of December instant, yielding and paying therefor yearly, during the said term, unto the said W. L. Bicknell, his executors, administrators, or assigns, the yearly rent or sum of 140*l.*, the said rent to be paid and payable quarterly, on the 25th day of March, the 24th day of June, the 25th day of September, and the 25th day of December, in every year; the first quarterly payment to be made on the 25th day of March, which will be in the year 1835.” And which said indenture of lease shall contain covenants by and on the part of the said W. C. Hood, his heirs, executors, and administrators, to pay the said yearly rent on or at the days or times above mentioned, and also all taxes, parliamentary or parochial, payable in respect of the said messuage or tenement and premises, and to keep the said fixtures, articles, and things in the same state in which they now are, and to deliver them up, except as after-mentioned, at the end of the term hereby agreed to be granted, reasonable wear only excepted; and all such other similar covenants, charges, conditions, and agreements as are contained in a certain indenture of lease dated the 16th day of October, 1823, and made between John M’Gill, builder, on the one part, and the said W. L. Bicknell of the other part, other than and except the covenant for the payment of rent by him, the said W. L. Bicknell, to the said John M’Gill, which he the said W. L. Bicknell hereby agrees to pay. And the said W. C. Hood, for himself, his heirs, executors, and administrators, hereby covenants and agrees with the said W. L. Bicknell, his executors and assigns, that he, the said W. C. Hood, his executors or administrators, shall and will, if and when requested so to do by the said W. L. Bicknell, his executors or administrators, accept such lease as aforesaid upon the terms and conditions above specified or re-

the instrument amounted to an agreement only, and not to a present demise.

ferred to, and execute a counterpart, and pay the expense of such lease and counterpart; and that, until such lease shall have been granted as aforesaid, it shall be lawful for the said *W. L. Bicknell*, his executors, administrators, and assigns, to *distrain* for all or any part of the rent which may become due from the said *W. C. Hood*, his executors, administrators, and assigns, for or in respect of the said messuage or tenement and premises hereby agreed to be demised, at any time after the execution of this agreement; and lastly, that he the said *W. C. Hood*, his executors, administrators, or assigns, shall and will, in the event of taking a further lease of the said messuage, tenement, and premises, from the 29th day of *September*, which will be in the year 1837, purchase and take of and from the said *W. L. Bicknell*, his executors or administrators, all the said fixtures, articles after specified, at a valuation in the usual way. In witness, &c."

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At the trial before Lord *Abinger*, C. B., at the *Middlesex Sittings* after last *Michaelmas Term*, it was objected on the part of the defendant, that this instrument operated as a demise, and therefore ought to have had a lease stamp, without which it was inadmissible. The learned judge, however, overruled the objection, and the plaintiff obtained a verdict, liberty being reserved to the defendant to move to enter a non-suit.

Henderson having in *Hilary Term* obtained a rule accordingly,

Crowder (with whom was *Peacock*) shewed cause.—There is nothing to show that this agreement was intended to operate as a present demise. It does not appear that immediate possession was to be taken under it; but, on the contrary, another and more complete instrument was to be prepared and executed. The clause enabling the plaintiff to distrain is a provision depending upon the contingency of the defendant occupying the premises before the lease was prepared. It is evident that the defendant could not, under this agreement, have brought an ejectment to recover possession of the premises.

The Court called upon

Henderson, in support of the rule.—The question is, whether by this agreement the lessor is bound to give possession. It was not necessary that the possession should be immediate, it might be to commence in futuro. Unless an interest passed under the agreement the clause of distress would be altogether futile. It would be incongruous to say that on the 25th of *March* the plaintiff was to have the option of treating the defendant either as a tenant or a trespasser. There is an express recognition of the relation of landlord and tenant, without which there could be no power of distress. [PARKER, B.—That is only in case the plaintiff shall permit the defendant to take possession. To constitute such a relation there must be a binding agreement that the defendant shall have possession.] A privilege is reserved to the landlord, which would not be exercised unless a tenancy existed. It is submitted that after the 25th *December* the defendant might have maintained an ejectment for the recovery of the premises.

Lord *Abinger*, C. B.—It must be admitted that the case presents considerable doubt. I assent to the principle, that the power of distress will, in

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general, create a tenancy, and if this agreement could receive no other construction, we ought undoubtedly to hold it a demise. But it appears to me that the other part of the agreement is inconsistent with any intention to grant a future lease; and if there appears any ground upon which the parties might reasonably have made this agreement, there is no reason why we should construe it as a lease. Now, the contract is to execute a lease on the 25th *December*, but by possibility the lease might not be ready at that time, and if that case should occur, and the premises should be occupied, then the plaintiff should be at liberty to distrain for any quarter's rent due prior to the execution of the lease. That appears to have been the intention of the parties in giving a power of distress, and in that view of the case, there is no reason why we should construe that provision as creating the relation of landlord and tenant; therefore the rule must be discharged.

PARKER, B.—When this rule was moved for I felt considerable doubt, nor am I altogether free from doubt at the present time; but upon the whole I think we may reasonably construe this instrument so as to render the agreement stamp sufficient. In order to constitute a lease, it is not necessary that the word “demise” should be used; any terms which amount to a grant, or shew an intention that the lessee shall have possession, are sufficient. Here, then, the point for consideration is, whether there is sufficient to shew an absolute agreement on the part of the lessor that the land should be occupied by the defendant. If it appeared that the lessor could have brought an ejectment on expressing his willingness to enter, then the instrument would have amounted to a lease. But it will be found that there is nothing in this agreement which binds the lessor to give possession, at all events, unless a lease is executed and the terms of the instrument are satisfied by supposing that the parties provided for the case of the lessee occupying before the lease was executed. The lessor agrees to grant a future lease, and the lessee agrees that the former shall have power to distrain, provided he occupy when the first quarter's rent becomes due, although there is no fresh agreement. Without that stipulation, the lessor could not have distrained until after rent had been paid by the defendant as a yearly tenant. In that point of view, the agreement is susceptible of a construction which does not make it *obligatory* on the lessor to allow the party to enter, that I do not say that it might not have been the intention of both parties that possession should be taken immediately.

GURNEY, B.—I think the fair construction of the instrument is that it does not amount to a lease.

MAULE, B.—There would have been no doubt about this instrument if the clause of distress had not been inserted in it. Every part except that clause shews it to be an agreement, and not a present demise. If the intention had been that the instrument should operate as a present demise, that clause would have been idle, because the lessor might have distrained without it. I think, therefore, the very clause confirms the view of the Court, that this instrument is not a lease, but an agreement only.

Rule discharged.

JSH JAH [XJ]
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